Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1592

ARTHUR F. TURCO, JR.,

Petitioner,

v.

MONROE COUNTY BAR ASSOCIATION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION FOURTH JUDICIAL DEPARTMENT

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In the
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No.

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Petitioner,
v.
MONROE COUNTY BAR
ASSOCIATION OF THE
STATE OF NEW YORK,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Petitioner, Arthur F.. Turco, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New York, Appellate Division, Fourth Judicial Department, by which he was disbarred from the practice of law.

OPINIONS BELOW

Two opinions were rendered by the Appellate Division of the Supreme Court of New York, dated respectively December 17, 1973 and January 28, 1975. Copies are annexed in the Appendix, 7a and 11a. The New York Court of Appeals rendered no opinion but merely signed an order dated February 19, 1975, denying the motion for leave to appeal and dismissing the appeal taken as of right. A copy is annexed in the appendix, 36a.

JURISDICTION

Petitioner, a practicing attorney of the State of New York, was disbarred by an order of the

Supreme Court, Appellate Division, Fourth Judicial Department, of that State dated January 28, 1975. Permission for leave to appeal was denied by the New York Court of Appeals under date of February 19, 1975. There was no petition for rehearing.

As explained below, petitioner is continuing to practice law by reason of a stay issued by a United States District Court in a collateral proceeding.

By order of this Court dated April 29, 1975, per Mr. Justice Marshall, the time for the filing of this petition was extended to June 19, 1975. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether a State may, consistent with the Equal Protection Clause of the Fourteenth Amendment, deny opportunity for appellate review as a matter of right to attorneys disciplined to the point of disbarment by a lower court of first instance when one appellate review is provided as a matter of right for every other litigant and class of litigants in that State whose rights are determined by a lower court?

2. Whether it was a violation of the Due Process Clause of the Fourteenth Amendment for a State court to adjudicate a lawyer guilty of professional misconduct and subsequently disbar him on the basis of misdemeanor convictions for conduct plainly outside the scope of his functioning as an attorney, where the statutory system for lawyer discipline provides that a misdemeanor conviction does not necessarily establish professional misconduct and where the record shows a refusal to grant any hearing at all on the issue whether the misdemeanor convictions in this case and other facts relationg to petitioner established professional misconduct?

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3. Whether an attorney charged with professional misconduct on the basis of prior conviction of a misdemeanor is entitled, under the Due Process Clause, to an opportunity in the disciplinary proceeding to establish his innocence of the misdemeanor charge, where the record shows that the misdemeanor conviction was not the result of trial on the merits but rather was entered on the basis of plea bargaining and a plea of guilty to greatly reduced charges, accompanied by an assertion of innocence?

4. Whether petitioner was not effectively entrapped in that in a proceeding relating to the collateral consequences to be given to a conviction of a misdemeanor he was not permitted to prove his innocence despite the fact that his plea of guilty arose out of plea bargaining with an assertion of innocence under this Court's opinion in North Carolina v. Alford, 400 U.S. 25 (1970), and his plea was entered in reliance upon his ability to establish innocence in any subsequent disciplinary proceeding?

5. Whether it was violative of the Due Process Clause for a State court to base its judgment of professional misconduct and disbarment on a) matters with which the petitioner had not been charged in the disciplinary proceeding and which he was not allowed to refute, b) statements of the prosecution in the misdemeanor proceedings that were merely unsupported allegations as to which there was no right of cross-examination in either the misdemeanor or disbarment proceedings, and c) indictments which had been withdrawn?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are:

1) Section 1 of the Fourteenth Amendment to the Constitution of the United States;
2) New York Constitution, Article 6, Sec. 3;
3) New York Judiciary Law, Sec. 90, Pars. 2 and 8.

These are all set forth in the Appendix, 1a-6a.

STATEMENT OF THE CASE

Arthur F. Turco, Jr., petitioner herein, was admitted to the New York Bar on December 21, 1967, in the Appellate Division, First Department.

After several years of successful practice, during which he represented many clients involved in unpopular causes, the petitioner on or about February 14, 1972, pleaded guilty to the misdemeanor of common law assault in Baltimore, Maryland. Subsequently, on March 8, 1972, petitioner entered a guilty plea in the Criminal Court of New York City to the misdemeanor of possessing a dangerous weapon.

The proceedings in Maryland arose out of a complex indictment which charged petitioner and others with grave offenses, including conspiracy to commit murder, all arising out of a series of events involving the Black Panther Party, which petitioner had been representing.

Petitioner was brought to trial but only after he had been held without bail for 10 months, most of which were spent in solitary confinement, which had a devastating impact upon his health. The jury disagreed. Petitioner, who had been functioning as an attorney on behalf of the Black Panthers and who was the only white among the defendants, alone was set for retrial by the prosecutor, all of his co-defendants having been acquitted or having

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had their cases dismissed at the request of the prosecutor.

When he was called for retrial, petitioner was given the choice of proceeding as the sole defendant on a charge of conspiracy to commit murder, assault with intent to murder, soliciting to commit kidnapping, and common law assault, or accepting a plea to a misdemeanor of assault with a commitment by the prosecutor that there would be a recommendation of no custodial sentence.

Petitioner, with a vigorous insistence of innocence of all charges made by his counsel on the record, opted for the plea of this minor charge, in the face of massive pretrial publicity and hysteria in the community which had been generated against him; legitimate fear for the safety of his family as a result of hate-group threats and intimidation from unidentified persons; repeated threats of bail revocation; a seriously ill wife; lack of funds to pay and retain local counsel; and the prosecutor's making it clear that if he did not plead to the minor misdemeanor charge, trial would be pressed on each of the foregoing grave charges involving aspects of murder.

But even this extraordinary choice, made with an assertion of innocence, was not resolved in the petitioner's mind until his counsel had first ascertained from the Bar Association of the City of New York that a plea to a misdemeanor would not result in automatic disbarment and that petitioner would have an opportunity to explain the circumstances of his plea to a referee in the State of New York and to establish his innocence.

A similar situation obtained in New York, where petitioner had been charged with possession of dangerous weapons, dangerous drugs, and

hypodermic instruments.[1/] A guilty plea was entered to the misdemeanor of possession of a dangerous weapon, with an assertion of innocence, the plea being offered under this Court's decision in North Carolina v. Alford, 400 U.S. 25 (1970).

The foregoing pleas were entered in February and March of 1972 and concerned incidents which allegedly occurred in July 1969 and February 1970. By August of 1971, petitioner had relocated to Rochester, Monroe County, New York, and had begun a successful and highly respected law practice.

On May 8, 1973, more than a year after the pleas, the Monroe County Bar Association instituted disciplinary proceedings against petitioner, based solely on the aforementioned pleas of guilt.

Under date of December 17, 1973, the Appellate

1/ The Appellate Division states petitioner was also charged with obstructing government administration. That is not so.

To put the New York charges in perspective it should be noted that the hypodermic instruments and accompanying insulin were demonstrably for petitioner's diabetic condition, and in pretrial proceedings their use as evidence was suppressed--a fact completely ignored by the Appellate Division. The dangerous drugs (marijuana) and dangerous weapons were not shown to be owned by petitioner and he was charged solely because these items were found in an apartment in which he was temporarily staying. Beyond that, they were found in the owner's bedroom, which was not occupied by petitioner--yet the owner was not charged! Indeed, a total of 10 defendants were charged with criminal offenses out of this episode and all charges against defendants other than the petitioner were dismissed.

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Division of the Supreme Court of New York, Fourth Department, adjudicated the petitioner guilty of professional misconduct. This decision was based exclusively on the petition of the Monroe County Bar Association, to which were attached copies of the transcripts of the proceedings in Maryland and New York, at which pleas were entered and the answer of petitioner in which he expressly declared his innocence, pointing out that he had done so when he entered the pleas, and sought a hearing and an opportunity to establish his claim of innocence. 2/

2/ Petitioner's statement in his answer was as follows:

"Although I have asked that the charges against me be dismissed in view of the facts developed in this answer, in the event the Court feels the proceedings must go forward, I think it is essential that a hearing be conducted before a judicial officer. It is uncontroverted that when I entered my plea in both cases I made it clear to the New York court and the Baltimore Court that I was innocent. That plea, which is constitutionally authorized under Alford v. North Carolina, 400 U.S. 25 (1970), should allow a person to go behind his plea when serious sanctions may flow from the conviction, such as in this case the disciplinary proceedings. The Alford case specifically recognizes that a man may be motivated to plead guilty for considerations separate and apart from guilt. Since that case acknowledges that a person may plead guilty who is in fact innocent, I think I should be allowed to assert my innocence in these proceedings which are unconnected in any way with the criminal proceedings in Baltimore and New York. In other words, I should be allowed to satisfy a fact-finding officer appointed by this

[Footnote continued on next page.]

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The Appellate Division did not grant a hearing of any type and, on the basis of the foregoing pleadings only, found petitioner "guilty of professional misconduct in his office as an attorney and counselor at law."

It is clear that under the New York disbarment statute not all misdemeanor convictions sustain a finding of unprofessional conduct; the matter is left to case-by-case determination, in which the conviction and its underlying facts are but one element. Matter of Kimball, 33 N.Y. 2d 586, 347 N.Y.S. 2d 453 (1973); In re Keogh, 25 App. Div. 2d 499, 267 N.Y.S. 2d 87, modified on other grounds, 17 N.Y. 2d 429, 266 N.Y.S. 2d 985, 214

[Footnote continued from previous page:]

Court that I was not guilty of possessing a dangerous weapon, nor was I guilty of common assault in Baltimore. The real issue before this tribunal is whether I have committed acts or offenses affecting my performance as a lawyer. If a judicial officer appointed by this Court were to determine on all the facts that I did not assault Mr. Anderson in Baltimore, and in fact never even knew him or saw him in my life, and did not possess either of the handguns found in Larry Weiser's bedroom closet in New York City, then it would seem to me there would be no basis for my being disciplined. At a hearing I could produce positive proof which would satisfy a hearing officer that I did not assault Mr. Anderson, nor did I possess the handguns in New York City. Therefore, if the charges are not dismissed outright, I most respectfully request that an appropriate hearing officer be appointed to hear and determine these facts which, although we submit are undisputed, may be contested."

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N. E. 2d 163 (1966).

In this case, the Appellate Division's decision of December 17, 1973 includes no explanation of its basis. It merely states that the "acts [sic] of which respondent stands convicted constitute professional misconduct." On the record before it, the only undisputed facts were the convictions themselves. All other aspects, e.g., whether petitioner was in fact guilty, why he entered the pleas, the factual background of the alleged crime, were at issue and petitioner had expressly sought and been denied a hearing on those matters.

On the question whether petitioner would be permitted to prove his innocence, the Appellate Division said:

> "In his answer respondent admits the convictions but seeks to prove that in fact he was not guilty of the charges to which he plead guilty; ... We ... conclude that North Carolina v. Alford (400 U.S. 25), on which respondent relies, does not support his contention that he has the right now to prove that he was not guilty of the charges as he plead."

The Appellate Division did grant petitioner leave to request a hearing on the question of "mitigation" of punishment and decided that such hearing be had before a referee with power to report but not to recommend.

The mitigation hearing commenced on March 28, 1974, before the Honorable Lyman H. Smith, a Supreme Court Justice, and was concluded on May 21, 1974. Justice Smith's findings were reported to the Appellate Division without recommendation on October 25, 1974.

The hearing included a probably unprecedented outpouring of support for a lawyer. There were

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forty-eight witnesses testifying on behalf of the petitioner, including a sitting United States District Court Judge, four sitting justices of the Supreme Court of New York, four sitting New York County Court judges, two sitting Rochester City Court judges, three sitting Justices of the Peace, a former Attorney General of the United States, four lawyers who were either then or had been trustees of the Monroe County Bar Association, the District Attorney of Cayuga County, the First Assistant District Attorney of Monroe County, the Bishop of the Episcopal Diocese of Rochester, and numerous other prominent lawyers and citizens of the community, all testifying to the extraordinary reputation for integrity and competence which the petitioner had earned. Mr. Turco himself testified in explanation of the incidents to which he had pleaded guilty, expressly denying his guilt, but, since the Appellate Division had already determined the issue of guilt on the two misdemeanor counts without a hearing and had made clear that it would not go behind the convictions to consider evidence as to innocence, Mr. Turco's attorney preserved his record by listing a wide range of witnesses Mr. Turco would have called to corroborate his claim of innocence if he had been allowed to relitigate the issue and prove his innocence. He also referred to documentary evidence which would absolutely have confirmed such testimony.

Petitioner's claim of innocence with respect to the Maryland charges was based upon a solid alibi supported by the proffered testimony of at least eight individuals, most of whom plainly had no interest in the matter and whose testimony was buttressed by documentary evidence. By contrast, the testimony which the State said it would present repeated a story told at the first trial by the main prosecution witness, whose testimony the trial

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judge found so inconsistent with the documented facts that after cross-examination he struck completely all of his testimony as being incredible. 3/

3/ In the first trial, the main witness, Mahoney Kebe, told essentially the story repeated by the Appellate Division but his testimony was stricken when it was established that he was attributing to Mitchell a conversation with him in the presence of Turco about killing Anderson, which conversation was alleged to have occurred at Panther headquarters at a time when court and jail documents established both that Mitchell was in jail and that Turco was at the court house seeking to bail him out.

The prosecutor's statement at the taking of the plea did not change the essentials of the story; she simply indicated that other witnesses would supply the same story that Kebe had offered at the first trial. The statement of the prosecutor also relied on Sam Walters to repeat his testimony given at the first trial. On cross-examination at that trial, Walters admitted that at the direction of his superiors he had perjured himself by attributing to Turco acts which his typed reports showed had been committed by Mitchell and that, also at the direction of his superiors, he had altered reports in pencil to insert Turco's name. Walters was a police officer.

It should be noted that at the time of the entry of the plea there was a stipulation as to what the State witnesses would testify to, but obviously the stipulation referred only to their testimony on direct. At the first trial it was on cross-examination that their testimony was effectively shown to be untruthful. The trial judge at the acceptance of the plea acknowledged that "discrepancies were developed at some length on cross-examination."

As to the New York proceeding, even the prosecutor was on record as admitting, after the entry of the plea, that investigation had confirmed that Turco had neither leased nor rented the premises in question. He also admitted that weapons, possession of which had been charged to Turco, had not even been found in his room.

After hearing oral argument on petitioner's mitigation claims, the Appellate Division rendered its judgment of January 28, 1975, disbarring the petitioner. Leave to appeal was denied by the New York Court of Appeals.

The Appellate Division opinion on mitigation, after first acknowledging that it refused to permit petitioner to establish his innocence, then proceeds for four pages to recount as proven fact mere statements by the prosecutor in Maryland as to what she claimed she would prove if a retrial were had. It should be clear that none of this material was the subject of testimony at the mitigation hearing, where there could be confrontation or cross-examination. This recounting by the Appellate Division was based exclusively on what the prosecutor said before the Maryland court on the proceedings relating to the acceptance of the plea as to what the State's witnesses would have testified to on direct examination.

By contrast, the Appellate Division relegated to a single sentence statements made on behalf of the petitioner by his counsel at the Maryland hearing as to the countervailing facts establishing a documented alibi. Moreover, in a manner which wholly distorts the transcript of the record before the Maryland court, the Appellate Division tried to make it appear that in the proceedings there the petitioner did not assert his innocence, whereas it is absolutely clear that he did. 4/

4/ A careful reading of the record in Maryland

[Footnote continued on next pg.]

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Particularly distorted is the Appellate Division's statement as to "the essence of respondent's [Mr. Turco's] testimony on the mitigation hearing" which suggests that he sought mitigation because of four circumstances set forth in the footnote below, 5/ without indicating that his major contention was that he was innocent of the charges to which he had entered pleas.

[Footnote continued from previous page:]
shows that the issue was as follows:

The State objected to a statement as to what Mr. Turco would personally testify and insisted that his counsel's statement of innocence be limited to a statement as to what a whole range of other alibi witnesses would testify. On that basis, the State went along with the plea and the continued assertion by counsel that petitioner was in fact innocent.

5/ "(1) that because of his active defense of minority persons in Maryland, especially blacks, he could not get a fair trial there...; (2) that his wife's ill health and the expense of defending himself against the New York County charges were also why he pled guilty there; (3) that he has been devoted to the defense of minority groups and underprivileged persons, largely without fee, and has performed a public service for which he should be commended instead of being charged with unprofessional conduct; and (4) that since his convictions he has conducted himself in an exemplary manner, continuing to defend the poor and defenseless and unpopular causes, and should be permitted to continue to do so." (At pp. 13-14.)

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Moreover, the Appellate Division proceeds, as it says, to weigh "the facts which the State of Maryland and the People of New York stated that they would prove upon a trial to establish respondent's guilt" (p. 14) against petitioner's "version of the facts underlying and surrounding the convictions" (ibid.; underscoring supplied), without recognizing that the entire proceeding had been truncated since ab initio petitioner had been denied his right to prove his innocence. Thus, the hearing, by virtue of the December 17, 1973 decision of the Appellate Division, included only petitioner's "version" of the facts and not his many supporting witnesses, who would have corroborated his claim of alibi in Maryland and his defense in New York.

In order fully to protect his position, and while preparing to present this petition, proceedings were begun in the United States District Court for the Western District of New York in an action entitled Arthur F. Turco, Jr. v. The Monroe Co. Bar Association and the Appellate Division of the Supreme Court, Fourth Judicial Department, Civ. Action No. 75-100, to enjoin the disbarment on the ground that the proceedings before the Appellate Division violated his Constitutional rights. Petitioner further sought a declaratory judgment that the statutes of New York which deny appeal as of right from attorney disciplinary proceedings are unconstitutional as a denial of equal protection of the law, in that New York lawyers are the only class of persons who are denied an appeal as of right from the tribunal of original jurisdiction. 6/ Petitioner's request for a stay was granted.

6/ Petitioner's proceeding before this Court simultaneously with an independent proceeding before the United States District Court is in accord with the procedure employed in Mannes v. Mayers, __ U.S. __, 42 L. ed. 2d 574, 583 (1975).

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Under date of May 12, 1975, the District Court heard argument on plaintiff's motion for a temporary injunction and defendants' cross-motion for dismissal. As of the submission of this petition, neither of these motions has been decided and the stay continues in effect.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER A STATE DENIES EQUAL PROTECTION OF THE LAWS WHERE IT PERMITS AN APPEAL OF RIGHT TO EVERY LITIGANT WHO APPEARS BEFORE ONE OF ITS COURTS OTHER THAN AN ATTORNEY CHARGED UPON A DISCIPLINARY PROCEEDING BEFORE ONE OF ITS LOWER COURTS, BUT INCLUDING ALL NON-ATTORNEYS CHARGED UPON A DISCIPLINARY PROCEEDING; AND WHETHER A STATE DENIES DUE PROCESS OF LAW WHEN IT DENIES APPELLATE REVIEW WHEN IT HAS NOT ACCORDED A FAIR HEARING BELOW.

Denial of Equal Protection

It will be observed that following the Appellate Division's decision, petitioner filed with the Court of Appeals of New York both a notice of appeal as of right and a petition for leave to appeal. The appeal taken as of right was dismissed on the Court's own motion for want of a "substantial constitutional question;" the petition for leave to appeal was also denied. Both actions appear in the order of the New York Court of Appeals dated February 19, 1975 (36a).

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This Court has held that, once a State legislature provides for an appellate process, it may not deny an appeal to a selected class of litigants on an arbitrary or capricious basis.

> "When an appeal is afforded ... it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." Lindsey v. Normet, 405 U.S. 56, 77 (1972).

In New York, the State legislature has provided that all litigants--criminal and civil--other than attorneys charged in disciplinary proceedings have at least one appeal as of right, on all questions of law and fact, from the decision of the trier-of-fact. (In the Appendix hereto, 37a-41a, we set forth a complete analysis of the opportunities for appellate review as of right under New York law.)

Under the New York Attorney-Disciplinary Statute, the Appellate Division is the court of original jurisdiction, or trier-of-fact, in attorney disciplinary proceedings. It does not sit, or review its referee's report, as an appellate tribunal. See, Cohen and Karger, Powers of the New York Court of Appeals, §108, at 452 (1951). But, pursuant to the statute, an attorney has no appeal as of right from the Appellate Division to the Court of Appeals (the only available appellate tribunal) on all questions of law and fact. (See 37a.)

The disciplined attorney will have an appeal only if he can satisfy the Court of Appeals that he has a Constitutional issue or he can apply for permission to appeal to the Court of Appeals. But this is plainly insufficient to eliminate the equal protection problem for at least two reasons: First, no other New York litigants have to apply for permission to appeal; they have at least one appeal, on all questions, as of right. Second, even if the

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attorney's motion for permission to appeal is granted, the scope of review under the statute is expressly limited to questions of law--whereas all other litigants have a right to at least one review on all questions, both of law and fact. 7/

We recognize that equal protection does not bar the State from making reasonable classifications among citizens. But there is no rational State policy served by denying attorneys the right to a review of orders which strip away their licenses, their livelihoods, and their reputations.

The State may seek to justify such denial by pointing to the special relationship between courts and lawyers. But that relationship provides no justification for depriving attorneys of minimal procedural safeguards.

The State may also argue that disciplinary proceedings of professionals are not of the same class as ordinary civil or criminal litigations. Even if that were true, equal protection would still be denied, for the State gives to all other New York professionals (aside from lawyers) a right to at least one judicial review of a disciplinary determination against them--and the scope of that review embraces all questions of law and fact, including the substantiality of the evidence.

Only one lower court decision has touched this question, Javits v. Stevens, 382 F. Supp. 131 (S. D. N.Y., 1974). The court ruled that the circumscribed appellate procedure in New York attorney disciplinary proceedings are not unconstitutional, but that decision was made in a case where the

7/ Hence, even if the Court of Appeals decides to review the attorney's case, it must nevertheless sustain the Appellate Division's finding of guilt if there is any evidence to support it--even if only the proverbial scintilla. See, Matter of Goodman, 199 N.Y. 143, 92 N. E. 211 (1910).

Appellate Division had affirmed the findings of its referee. But here the Appellate Division expressly directed the hearing officer to make no recommendation.

New York's denial to its disciplined lawyers of a right to appeal is not only plainly violative of the equal protection principles of Lindsey v. Normet, supra, but is also directly at odds with lawyer disciplinary procedures in all other States. New York appears to be unique in that it provides for disbarment by one of its lower courts and yet affords no appeal as of right. There are many States which effect disbarment by a proceeding brought before the highest court by a bar association or other body charged with prosecuting and taking testimony on disciplinary charges. 8/ Obviously there can be

8/ Alaska R. Ct. P. Admin., Alaska Bar R. (Supp. 1966); Ariz. R. Sup. Ct. (1973); West Ann. Calif. Bus. & Prof. Code 6100, et seq. (1974); Colo. Rev. Stat. Ann. R. G. P., §§ 241-259 (1973); Del. Code Ann. R. Sup. Ct. 32 (rev. 1974); Hawaii Rev. Stat. Title 32, §605 (Supp. 1974); Idaho Code Title 3, ch. 3 (1974); Smith-Hurd Ill. Ann. Stat., ch. 110A, §§751-753 (1968); Burns Indiana Stat. Ann. Ct. R. 23 (1974); Kan. Stat. Ann., ch. 7, R. Sup. Ct. 7-124 (Supp. 1974); Ky. Rev. Stat. R. Ct. App. (1974); La. Rev. Stat. Ann., Art. 15, ch. 4(1974); Minn. Stat. Ann., §480.05, et seq. (1971); Miss. Code Ann., §73-3-301, et seq. (Supp. 1974); Mont. Stat., §93-2017, et seq. (1973); Neb. Rev. Stat., §7-114, et seq. (1955); Nev. Sup. Ct. R. 99, et seq. (1957); N.H. Rev. Stat. Ann., §311.8 (1966); N.J. Sup. Ct. R. 1:20 (1971); N.M. Stat., §§18-1-17 to 21-2-1(3)(1953); N.D. Cent. Code, §27-14-02 (1974); 5 Okla. Stat. Ann., §13 App. (Supp. 1975); Ore. Rev. Stat., §§9.560 to 9.480 (Supp. 1975); Pa. Sup. Ct. R. 17 (1974); Gen. Laws R.H., Sup. Ct. R. 10 (1970); S.D. C.L., ch. 16-19-1 to 16-19-19

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no appeal when the highest court is also the court of first instance. In eight States that provide for disbarment by a lower court, an appeal as of right is afforded. 9/ In seven States provision is made for disbarment by either a lower court or by the highest court of the State, but if disbarment is effected at the lower court level, then an appeal to the highest court is guaranteed. 10/

[Footnote continued from previous page:] (1967); Utah Code Ann., §78-51-37 (1953); Vt. Stat. Ann., Title 4, §§901-906 (1972); Rev. Code Wash. Ann., Title 2 (1961); Wisc. Stat. Ann., §256.283 (Supp. 1974); Wyo. Stat. Ann., Vol. 2A, R. Disc. Code V-X (1957).

9/ Ala. Code, Title 46, §§33, 49 (Recom. 1958); Ark. Stat. Ann., §25-401, et seq. (1962); Conn. Gen. Stat. Ann., Title 51 (1958); Fla. R. Ct., R. Fla. Bar XI (1975); Code of Ga. Ann., Title 9, Disc. R. (App. 1973); Iowa Code Ann., §610 (Supp. 1974); Me. Rev. Stat. Ann., Title 4, §§801-855 (Supp. 1974); Md. Ann. Code, Art. 10 (Supp. 1974)

10/ Ann. Laws Mass., ch. 221, §40 (1974); Mich. Comp. Laws Ann., ch. 600 R. State Bar 16.17 (1968); Mo. Rev. Stat. §484.190-270 (1949); N.C. Genl. Stat. Ann., §84-28(1) (1975); Ohio Rev. Code Ann., §4705.01, et seq. (1971); Code of Va., Title 54 (1974); W. Va. Code, ch. 30 (1971).

Denial of Due Process

Petitioner's right to appellate review on all questions in an attorney disciplinary proceeding is not derived solely from the Equal Protection Clause; the Due Process Clause guarantees it as well.

While it is generally true that due process does not require a State to provide litigants with appellate review, the same is not true where, as here, the State has failed to provide for a full and fair hearing in the court of original jurisdiction. As this Court stated in Ohio ex rel. Bryant v. Adron Metropolitan Park District, 281 U.S. 74, 80 (1929):

> "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." (Emphasis added.)

Accord, Lindsey v. Normet, supra, 405 U.S. at 56.

The cases establishing the proposition that "appeal is a matter of grace, not right ... also assumes that the thwarted appellant has been accorded one fair hearing." States Marine Lines, Inc. v. Federal Maritime Commission, 376 F. 2d 230, 241, n. 25 (D.C. Cir., 1967).

However, as we show in the following sections of this petition, the Appellate Division did not afford petitioner at least "one fair hearing" because that tribunal adjudicated petitioner guilty of unprofessional conduct without ever hearing testimony and without permitting testimony on the critical questio before it, namely, whether the guilty pleas established unprofessional conduct and whether he was in fact guilty.

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The issue relating to a denial of a right to appeal in New York disciplinary proceedings is currently the subject of parallel litigation before a three-judge federal court in the United States District Court for the Eastern District of New York in three consolidated cases in which oral argument was had on March 12, 1975. 11/ As of the date of this petition, no decision has been rendered by that court.

II.

PETITIONER PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER THE RULE OF BAXSTROM V. HEROLD, 383 U.S. 107 (1966), SPECHT V. PATTERSON, 386 U.S. 605 (1967), AND HUMPHREY V. CADY, 405 U.S. 504 (1972), IS APPLICABLE TO LAWYER DISCIPLINARY PROCEEDINGS WHERE A COLLATERAL CONSEQUENCE OF DISBARMENT IS SOUGHT TO BE BASED UPON A PRIOR MISDEMEANOR CONVICTION.

Baxstrom, Specht, and Humphrey made clear that before a collateral consequence of a conviction could be imposed, a due process hearing was

11/ Gerzof v. Gulotta, No. 74-C-1684; Levin v. Gulotta, No. 74-C-1668; and Mildner v. Gulotta, No. 74-C-1101. The panel consists of Circuit Judge Leonard Moore and District Court Judges Weinstein and Neaher. The cases all involve New York lawyes who were suspended by the Appellate Division and are complaining of the denial of a right to appeal. Pending determination by the three-judge court, the suspensions have been stayed.

required to determine the issue as to whether that secondary consequence properly flowed from the conviction. Specht and Humphrey dealt with one who had been convicted of a sex offense and was facing additional and collateral punishment under a sex offense statute; Baxstrom involved commitment for mental incompetence following a conviction for crime.

This case presents the issue as to the application of the foregoing principles to lawyer discipline as a collateral consequence of a prior conviction of a misdemeanor for conduct not as a lawyer. In New York, as in many other States (43 Cornell Law Quarterly, 489, 490 (1958)), conviction of a felony results in automatic disbarment with no adjudication proceeding of any sort. But conviction of a misdemeanor does not necessarily but may bring about disciplinary consequences following a proceeding to determine whether the conviction establishes aspects of "moral turpitude." In re McNally, 252 App. Div. 550, 300 N.Y.S. 459, 460 (1937); In re Smith, 216 App. Div. 173, 213 N.Y.S. 751 (1926).

In re Ruffalo, 390 U.S. 544, 550 (1968), establishes that a disciplinary proceeding of a lawyer is "of a quasi-criminal nature" and that the basic requirements of due process apply. Of course we recognize that "once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Gross v. Lopez, 42 L. ed. 2d 725, 737 (1975). If, as in this case, the proceeding results in disbarment--effectively capital punishment as a lawyer--due process would certainly require notice and a hearing with an opportunity to present evidence relating to the crucial question, i.e., whether the conviction established unprofessional conduct.

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The proceeding before the Appellate Division plainly lacked due process under the Baxstrom, Specht, and Humphrey doctrine because no hearing was ever afforded on the issue decided by the first decision of the Appellate Division dated December 17, 1973, wherein that court determined that the circumstances on which petitioner was convicted for misdemeanors in Maryland and New York merited a finding of "guilt" of professional misconduct. It was in that decision that the Appellate Division adjudicated guilt of professional misconduct; everything thereafter was purely a mitigation hearing. But, as pointed out above, in New York, not every misdemeanor, and certainly not every assault or weapons conviction, establishes professional misconduct. It is rather the content of the conduct which is indicated by the conviction and the subsequent conduct of the individual which may or may not establish lack of professional responsibility. It is that very determination which requires a hearing and an adjudicative process which comports with due process of law. That was precisely denied by the Appellate Division when it acted solely upon the basis of a petition and answer, without affording a hearing before adjudicating guilt.

While we do not concede the point, we suppose it could be contended that some types of convictions of a lawyer require no further hearing to determine questions of an attorney's unprofessional conduct, e.g., theft of a client's money; but where one deals with misdemeanor convictions plainly outside of his functioning as an attorney, then it seems obvious that a due process hearing is required to bridge the gap between the conduct of which the attorney is convicted and the question whether that conduct can justify the finding of professional misconduct.

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Many States seem to provide for a hearing on the question whether a particular misdemeanor conviction in lawyer discipline cases establishes professional misconduct. 12/ But the issue is quite obscure and in some States no due process hearing is so provided. 13/ Remarkably, there are very few decisions which contain any articulate discussion of the issue.

In In re Ming, 469 F. 2d 1352 (1972), the Seventh Circuit considered disciplinary proceedings against a lawyer who, after a trial, had been convicted on four counts of wilfully and knowingly failing to file federal income tax returns. Subsequently, a petition based on these convictions was filed, seeking his disbarment or suspension from the practice of

12/ Some State statutes specifically so provide: Ariz. R. Sup. Ct., §29(c) (1973); West Ann. Calif. Bus. & Prof. Code, §6102(b) (1974); Colo. Rev. Stat. Ann. R. Civ. P., §258 (1973); La. Stat. Ann., Art. 15, ch. 4 app. (1974); Pa. Sup. Ct. R. 17-13, 17-14 (1974); S. D. Comp. L., ch. 16-19 (1967); Code of Va., §54-74(6) (1974); Wisc. Stat. Ann.,§256.283-.285 (1971).

In some States, the hearing is required by judicial decision; for example: People ex rel. Attorney General v. Edison, 100 Colo. 574, 69 P. 2d 247 (1937); In re Dampier, 267 P. 452 (1928); In re Grossgold, 58 Ill. 2d 9, 317 N. E. 2d 45 (1974); In re Sauer, 390 Mich. 449, 213 N.W. 2d 102 (1973); In re Burton, 257 N.C. 534, 126 S. E. 2d 581 (1962); In re Stolper, 185 Okla. 459, 94 P. 2d 832 (1939); In re Corcoran, 215 Ore. 660, 337 P. 2d 307 (1959).

13/ Miss. Code Ann., §73-3-301 to 373 (Supp. 1974); Hawaii Rev. St., Title 32, §605 (Supp. 1974); Tenn. Code Ann., §29-309, et seq. (1956).

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law in the same court. Ming filed an answer, stating inter alia that he was not guilty of the offenses charged. Then, "without a hearing and with only the petition and the answer before it, the Executive Committee [of the United States District Court] ... suspended Ming from practice." 467 F. 2d at 1353. The Court of Appeals reversed because "the lack of a hearing before the Executive Committee constituted a denial of due process." Ibid.

Louisiana State Bar Association v. Ehmig, (La.) 277 So. 2d 137 (1973), dealt with disbarment for conviction of a "serious crime." The attorney in that case had been convicted after a trial of a tax fraud which was classified as a felony. The court held the attorney was entitled to a due process hearing on the issue whether this was a "serious crime." See also, In re Burton, 257 N.C. 534, 126 S.E. 2d 581 (1962); In re Lewis, 389 Mich. 668, 209 N.W. 2d 203 (1973); In the Matter of Sauer, 300 Mich. 449, 213 N.W. 2d 102 (1973).

The paucity of discussion of the nature of the hearing required to bridge the gap between prior conviction of a misdemeanor and a determination of professional misconduct in lawyer discipline cases emphasizes the need for this Court's granting this petition so as to provide appropriate Constitutional guidelines as to minimal due process standards for this type of case. And the facts in the instant case, as outlined above, provide an extreme example of the consequences of the absence of such direction from this Court.

III.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER, DESPITE A PLEA OF INNOCENCE MADE UNDER THIS COURT'S RULING IN NORTH CAROLINA V. ALFORD, 400 U.S. 25 (1970), THAT ASSERTION OF INNOCENCE MAY BE IGNORED IN A BAR DISCIPLINARY PROCEEDING WHICH CONSIDERS THE COLLATERAL CONSEQUENCES OF A CONVICTION.

Aside from Constitutionally mandated procedural requirements for the transition from a misdemeanor conviction to a finding of professional misconduct, there is the separate question of the binding nature of the conviction.

The general direction of the law as fixed by statute seems to be that at least in this field a misdemeanor conviction is "binding" or "conclusive" and the attorney may not go behind it. 14/ But

14/ Ala. Code, Title 46, §§33, 49 (Supp. 1974); Ariz. R. Sup. Ct. 29(c) (1973); Ark. Stat. Ann., §25-410 (1962); West Ann. Calif. Code Bus. & Prof. Code, §6101 (1974); Colo. Rev. Stat. Ann. R.C. Pro., §258 (1973); Code of Ga. Ann., Title 9, Disc. R., §9-501 (1973); Idaho Code, Title 3, §3-301 (1974); Iowa Code Ann., §610, 24 (Supp. 1974); Ky. Rev. Stat. Ann. R. Ct. App., §3.320 (1974); La. Rev. Stat. Ann., Art. 15, ch. 4, §8 (1974); Minn. Stat. Ann., §480.15 (1971); Miss. Code Ann., §73-3-339 (Supp. 1974); Mont. Stat., §93-2017, et seq. (1973); Nev. Sup. Ct. R. 99 (1957); N.M. Stat., §18-1-20 (1953); Ore. Rev.

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aside from the fact that such an approach seems to conflict with that applied in other fields of law, 15/ a serious question is raised as to whether such an analysis comports with due process where there was no trial in the criminal proceeding and where there was an assertion of innocence--a procedure permitted by this Court under its ruling in Alford.

In Alford, this Court held that a plea of guilty may be accepted by a court despite a claim of innocence. As this Court there pointed out, there are many reasons why a defendant may choose that course, commonly a vast difference between the charge that would be pressed at trial and that for which a plea would be accepted.

But why does one press an assertion of innocence despite a plea of guilty? Obviously, the defendant may believe he is in fact not guilty and does not wish his plea to be binding upon him in a collateral

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[Footnote continued from previous page:] Stat., §9.560-9.480 (Supp. 1975); S.D. Comp. L., §16-19-2 (1967); Utah Code Ann., §78-51-37 (1953); Rev. Code Wash. Ann., §2.48.220 (1961); Wisc. Stat. Ann., §256.283(7) (Supp. 1974); Wyo. Stat. Ann., Vol. 2A, R. Disc. Code X (1957). All the foregoing statutes deal with conviction of a misdemeanor involving moral turpitude or a serious crime.

15/ St. Paul Fire & Marine Insurance Co. v. Lack, 476 F. 2d 583 (4th Cir., 1973) (plea of guilty to manslaughter not binding in subsequent civil suit even though manslaughter is defined as intentional killing); semble, State Farm Mutual Auto Ins. Co. v. Worthington, 405 F. 2d 683 (8th Cir., 1969); Franklin Life Ins. Co. v. Strickland, 376 F. Supp. 280 (N.D. Miss., 1974); Kerr v. Commissioner of Internal Revenue, 351 F. 2d 1 (2nd Cir., 1965) (plea of guilty to tax fraud not conclusive on government's claim for deficiency).

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proceeding. That is the basic design of the Alford plea.

This Court's decision in Alford effectively loosened the joints of the criminal process by encouraging plea bargaining on the foregoing basis. This case presents the issue whether the entire design of an Alford plea may be frustrated by holding that the defendant is bound in a collateral proceeding as if he had admitted guilt or stood trial and been convicted.

We wish to emphasize that the issue is not whether guilty pleas are binding in the case in which they are entered. The issue is solely whether they are binding in a case dealing entirely with their collateral consequences. Alford's holding is precisely designed to permit a finding of guilt in a criminal case while leaving the collateral consequences open for subsequent determination. After all, it is that distinction which explains why a person is willing to enter a guilty plea. To take away that distinction is to destroy the whole meaning of Alford.

In addition, because these pleas were entered in confident reliance upon the official declaration of the law as set forth in Alford, the denial of a full hearing on the issue of guilt constitutes "an indefensible sort of entrapment by the State," prohibited by Raley v. Ohio, 360 U.S. 423, 426 (1959), and Cox v. Louisiana, 379 U.S. 559 (1965). As this Court said, "convicting a citizen for exercising a privilege which the State had clearly told him was available to him" is a denial of due process. 360 U.S. at 425-26; 379 U.S. at 571. In the same way, petitioner's disbarment by the New York court without an opportunity to substantiate his continued assertions of innocence to the prior charges penalizes him for acting in reliance upon the statement of law clearly expressed by this Court in Alford. Such a penalty is an unconstitutional denial of due process.

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IV.

THE PETITION PRESENTS FOR REVIEW A FEDERAL QUESTION OF SUBSTANCE DECIDED BY THE APPELLATE DIVISION IN A WAY NOT IN ACCORD WITH DECISIONS OF THIS COURT, NAMELY, WHETHER IN A DISCIPLINARY PROCEEDING AGAINST A LAWYER, DISBARMENT MAY ENSUE a) FROM CHARGES NOT INCLUDED IN THE DISCIPLINARY COMPLAINT, b) FROM ASSERTIONS OF A PROSECUTOR UNSUPPORTED BY EVIDENCE, AND c) ON THE BASIS OF INDICTMENTS WHICH HAD BEEN WITHDRAWN.

In re Ruffalo, supra, dealt specifically with the requirements of "fair notice of the charge" in a lawyer disciplinary proceeding, as part of the overall entitlement to due process in such proceedings. Analysis of the details of the procedure before the Appellate Division in this case shows a pervasive denial of the elements of due process in every facet of the proceeding.

A.

The petition filed by the Bar Association charged petitioner with conviction of two misdemeanors. But it is plain on its face that the Appellate Division decision of disbarment was based not on those convictions but on a charge of involvement in a conspiracy to murder and a charge of escape to Canada, both of which were expressly dropped.

Nothing in the petition filed by the Bar Association would give warning that it was pressing for discipline on charges other than those of which petitioner

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had been convicted. While it is true that the petition had annexed to it transcripts of the court proceedings, the pleading shows that guilt of "unprofessional conduct" was being charged on the basis of the misdemeanor convictions.

Of course an attorney may be found guilty of unprofessional conduct in respect to actions which did not produce a conviction; but that was not the point of the petition. Had it been such, the issue before the Appellate Division would have been whether the attorney had committed the charged acts and proof of innocence would have been permitted. But the Appellate Division insisted it was proceeding only upon the basis of the convictions of misdemeanors, and indeed it did not permit him to go behind the convictions. Yet that is exactly what the Appellate Division did when its opinion emphasized that it viewed the matter as by no means involving a simple assault or a possession of weapons charge. Thus, disbarment was based not on convictions for misdemeanors with which petitioner was charged, but on items of which he was not charged in the petition or permitted to refute.

This is precisely prohibited by In re Ruffalo, supra. We do not believe that the procedural constraints of that case may be overcome by the method of bifurcating the proceedings from the imposition of sentence. If the net result of both proceedings is, as in this case, disbarment for matters not charged, then that is plainly prohibited by Ruffalo.

B.

The entire basis for the Appellate Division's disbarment ruling was the prosecutors' assertions of what they would have attempted to prove had there been a trial.

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Such a procedure was entirely appropriate in the Maryland and New York misdemeanor proceedings involving the question whether those courts would accept a guilty plea. But when the matter is moved to collateral consequences, how can mere assertions of a prosecutor, unsupported by evidence under oath and subject to cross-examination, be taken as fact?

Granted, as mentioned above, that once it is determined that due process applies, the question remains, "What process is due?", Morrissey v. Brewer, supra, the foregoing procedure does not meet even the most minimal standard of due process.

The judge in Maryland was quite aware of the shakiness of some of the State's witnesses and said so on the record (supra, n. 3). There the petitioner was willing that the prosecutor's statement be accepted with his own counsel's assertion of innocence. But in this case he disputed those facts and yet the Appellate Division, without affording a hearing, assumed as proven fact what a prosecutor said he hoped to establish on direct and before cross-examination.

In Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963), this Court, in dealing with New York Bar admission procedures, insisted on procedural due process so that an applicant would have an opportunity to confront and cross-examine his accusers. Such a requirement would certainly be required in disbarment proceedings.

C.

It is evident that the basis upon which the Appellate Division disbarred petitioner was for alleged conduct embodied within indictments which were withdrawn. We suppose that had the Bar Association undertaken to prove that, despite the withdrawal

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of the indictments, petitioner nevertheless committed the alleged acts, that might have been an acceptable mode of attack. But in that case, the Bar Association would have been required to prove its contentions by the normal standards of an adversary proceeding, i.e., witnesses subject to cross-examination. The Bar Association certainly could not rely upon withdrawn indictments supported by unverified contentions by the prosecutor as to what he might have proved on direct and before cross-examination if he had not withdrawn the indictments. Yet that is exactly what occurred in this case.

CONCLUSION

There is a pervasive lack of clarity of the extent to which due process and equal protection govern lawyer disciplinary actions. The Court's decision in Ruffalo was important in emphasizing that Constitutional restraints do govern such proceedings. But, as is obvious from this case, there remain numerous questions of procedure in respect to such cases where Constitutional guidelines should be delineated.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON STAVIS
DORIS PETERSON
Center for Constitutional Rights
853 Broadway
New York, New York 10003

Dated:
June 16, 1975.

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APPENDIX

Fourteenth Amendment Section 1,
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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New York Constitution, Article 6, §3
[Jurisdiction of the Court of Appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record or original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of

public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon the application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or order entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion

a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision.

New York Judiciary Law, §90

(2) The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of prossional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in conncection with the application for admission to practice.

(8) Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceedings upon questions of law involved therein, subject to the limitations prescribed by article six, section seven of the constitution of this state.

December 17, 1973

APPELLATE DIVISION
OF THE
SUPREME COURT
STATE OF NEW YORK
FOURTH JUDICIAL DEPARTMENT

PRESENT: DEL VECCHIO, J.P., MARSH, MOULE, CARDAMONE, SIMONS, J.J.

In the Matter of ARTHUR F. TURCO, Jr., an attorney, Respondent,

Monroe County Bar Association, Petitioner.

Upon reading and filing the petition of the Monroe County Bar Association, verified the 8th day of May, 1973 by Anthony R. Palermo, President, alleging that respondent is or may be guilty of professional misconduct in his office as an attorney and counselor at law, together with the exhibits annexed thereto, the answer of Arthur F. Turco, Jr., filed the 21st day of June, 1973, in which he requests that the charges be dismissed, or, in the alternative, for other relief, together with the appendix annexed thereto, and after hearing Mr. Bruce E. Hansen and Mr. Michael F. Tomaino, of counsel for petitioner, and Mr. Harold P. Fahringer, of counsel for respondent, and due deliberation having been had thereon,

This Court hereby finds that respondent is guilty of professional misconduct in his office as an attorney and counselor at law, and

It is hereby ORDERED, that if respondent desires a hearing in mitigation of the discipline to be adjudged, he may so advise the Court within twenty days from the date of the entry of this order and such hearing will be accorded to him.

Memorandum: In Maryland, respondent was indicted and tried for conspiracy to commit murder, assault with intent to murder and other crimes. After the jury disagreed and a new trial was ordered, respondent plead guilty to common law assault. Thereafter, respondent was arrested and charged in the Criminal Court of the City of New York with possession of dangerous weapons and ammunition therefor, possession of dangerous drugs and other crimes. He plead guilty to possession of a dangerous weapon in violation of §265.05 of the Penal Law in full satisfaction of these charges and an additional charge of jumping bail and fleeing the jurisdiction. By reason of the above two convictions of respondent the Monroe County Bar Association has petitioned this Court under Section 90 of the Judiciary Law for disciplinary action against him. In his answer, respondent admits the convictions but seeks to prove that in fact, he was not guilty

of the charges to which he plead guilty; and he asserts that the petition is insufficient in law and he moves for its dismissal. We conclude that the petition is sufficient and that the motion should be denied. We also conclude that North Carolina v. Alford (400 U.S. 25), on which respondent relies, does not support his contention that he has the right now to prove that he was not guilty of the charges as he plead. In Alford, supra, the court merely held that it is proper for a court to accept a defendant's plea of guilty to a lesser crime in compromise of an indictment, provided the plea is voluntarily made (see, in accord, People v. Clairborne, 29 N.Y. 2d 950; People v. Foster, 19 N.Y. 2d 150; People v. Griffin, 7 N.Y. 2d 511). No claim is made here that respondent's pleas were not voluntary.

Although respondent suggests that his pleas were reluctantly made and were similar to pleas nolo contendere and hence of no effect in another proceeding (see Matter of Kimball, 33 N.Y. 2d 5) the plea of nolo contendere has been abolished in New York (Ando v. Woodberry, 8 N.Y. 2d 165, 170), and the records of respondent's pleas show conclusively that they were nothing less than pleas of guilty to reduced charges. In the absence of a contention that respondent has evidence "which was unavailable to him" at the time of those pleas (see Matter of Keogh , 17 N.Y. 2d 479, 481), we deem the two convictions to be final and binding upon him.

These acts of which respondent stands convicted constitute professional misconduct on his part in violation of Canons of Professional Ethics, Nos. 29 and 32, and of the Code of Professional Responsibility, Disciplinary Rules, No. 1-102(A)(3)(5) and (6), namely, that a lawyer should strive at all times to uphold the honor and maintain the integrity of the profession, and will find his highest honor as an honest man; and that he will engage in no illegal conduct involving moral turpitude or that is prejudicial to the administration of justice or that adversely reflects on his fitness to practice law. For such misconduct respondent should be disciplined.

If respondent desires a hearing in mitigation of the discipline to be adjudged, he may so advise the court within 20 days of the entry of the order hereon, and such a hearing will be accorded to him.

It is hereby further ORDERED, that pursuant to Judiciary Law, §90, this Order, being intermediate, is confidential and not published.

Enter.

LESTER A. FANNING

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS

STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
FOURTH DEPARTMENT

In the Matter of Arthur F. Turco, Jr.,
an attorney, Respondent,

Monroe County Bar Association,
Petitioner.

Decided: January 28, 1975

PRESENT: HON. JOHN S. MARSH, Presiding Justice
HON. REID S. MOULE,
HON. RICHARD D. SIMONS,
HON. WALTER J. MAHONEY,
HON. FRANK DEL VECCHIO,
Associate Judges

APPEARANCES:

MICHAEL T. TOMAINO
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Attorney for Petitioner

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Attorney for Petitioner

HERALD PRICE FAHRINGER, ESQ.
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Buffalo, New York 14202
Attorney for Respondent

OPINION

Per Curiam:

Respondent was admitted to the New York Bar on December 21, 1967 in the First Department. He practiced law in the metropolitan area and environs for several years, and in August, 1971 he moved to Rochester, employed as attorney for the new Bail Fund established in Rochester. After six months that employment terminated and he entered private practice in Rochester and vicinity.

In February, 1972 in Baltimore, Maryland he entered a plea of guilty of common-law assault, a misdemeanor, in satisfaction of May, 1970 indictments against him and others, including a charge of conspiracy to murder and assault with intent to murder, and he was sentenced to a term of five years in the custody of the Department of Correction; but the sentence was suspended and he was released on condition of good behavior for five years. In respect of this, the sentencing judge said,"If, as Mr. Kunstler suggests, Mr. Turco intends to leave Maryland and take up his activities elsewhere, I can see no useful purpose to be served by active supervision by the Probation Department."

Thereafter, on March 8, 1972 in the Criminal Court of the City of New York, New York County, respondent entered a plea of guilty of unlawful possession of a weapon in violation of Section 265.05

of the Penal Law, as a misdemeanor, in satisfaction of multiple charges made against him and another in February, 1970, including possession of dangerous weapons and drugs, and, later, bail jumping and fleeing the jurisdiction, and he was given a sentence of conditional discharge. He continued to practice law in the Monroe County area.

Under date of May 8, 1973, following a year-long investigation, the Monroe County Bar Association filed a petition with this Court attaching thereto the proceedings underlying the above convictions, and asked this Court to determine whether respondent should be disciplined by reason of such convictions. Respondent appeared, interposed an extensive answer and moved for change of venue to the First Department, and, in case that was denied, for a hearing on the validity of the convictions as predicates for disciplinary proceedings. We denied the motion for change of venue and received briefs on the question of the right of respondent to present evidence to prove that in fact he was not guilty of the crimes for which he was convicted. In support of his contention, respondent relied on North Carolina v. Alford (400 U.S. 25).

We concluded that the Alford case does not support respondent's contention; that in Alford, supra, the court merely held that it is proper for a court to accept a defendant's plea of guilty to a lesser crime in compromise of an indict-

ment, provided the plea is voluntarily made (see, accord, People v. Clairborne, 29 N.Y. 2d 950; People v. Foster, 19 N.Y. 2d 150; People v. Griffin, 7 N.Y. 2d 511). As we shall point out later herein, no claim is made, nor can there be, that either of respondent's above guilty pleas was involluntary.

Although respondent suggested that his pleas were reluctantly made and were similar to pleas of nolo contendere and hence of no effect in another proceeding (see Matter of Kimball, 33 N.Y. 2d 586), the plea of nolo contendere has been abolished in New York (Ando v. Woodbury, 8 N.Y. 2d 165, 170) and the records of respondent's pleas show conclusively that they were nothing less than pleas of guilty to reduced charges to avoid convictions for the more serious charges and the severe sentences likely to be imposed thereon. We ruled, therefore, that in the absence of a contention that respondent has evidence "which was unavailable to him" at the time of those pleas (see Matter of Keogh, 17 N.Y. 2d 479, 481) the convictions were final and binding upon him. We concluded that the acts to which respondent pleaded guilty constitute professional misconduct on his part in violation of Canons of Professional Ethics, Nos. 29 and 32, and of the Code of Professional Responsibility, Disciplinary Rules No. 1-102 (A)(3)(5) and (6), namely, that a lawyer should strive at all times to uphold the honor and maintain the integrity of the profession and will find his highest honor

as an honest man and as a patriotic and loyal citizen, and that he will engage in no illegal conduct involving moral turpitude or that is prejudicial to the administration of justice or that adversely reflects on his fitness to practice law; and that for such misconduct, respondent must be disciplined. We gave respondent the opportunity, however, to have a hearing in mitigation of the discipline to be adjudged.

Respondent requested such a hearing, and a justice of the Supreme Court was designated to hear and report the evidence presented on such hearing. The hearing was held over a period of seven days and is contained in 800 pages of minutes. Respondent called over 45 witnesses, about 40 of whom were from the Rochester area who did not know respondent before he came to Rochester in 1971 and did not know anything of his prior conduct. They testified to his high ability as a lawyer and his good character. The hearing justice gave respondent full leeway and opportunity to explain his conduct and his reasons for pleading guilty. Respondent's testimony and supporting evidence submitted in refutation of the evidence which the State's Attorney in Maryland and the District Attorney in New York stated to the respective courts that they would present on trial of respondent if he did not plead guilty, was detailed and quite complete. In consideration of the matter of mitigation we have reviewed the evidence underlying the charges against

respondent which led to his plea of guilty in each of his convictions, and his explanations thereof.

In 1968, soon after he was admitted to the Bar, respondent began employment by William Kunstler in Manhattan. He soon was engaged in representing the Black Panther Party. He testified that Messrs. Kunstler, Lefcourt and he were the first attorneys to represent the Black Panthers on the East coast of the United States, that their services required respondent's appearance in various cities from New England southerly in the East coastal States to Maryland, and that the services were rendered for little or no fee, as the circumstances required. He also represented other indigent persons. He assisted Mr. Lefcourt in a nine-months' trial of the so-called "Panther 21" in New York City.

In February, 1969,members of the Black Panther Party in Baltimore, Maryland were accused of arson, bombing and other crimes. Members of that Party who were residents in New York were extradited to Maryland, and respondent went there to represent them. From the statement of testimony which the State's Attorney of Maryland advised the Criminal Court of Baltimore, at the time of respondent's conviction there, that he was prepared to present against respondent upon his second trial and which respondent stipulated would be the testimony against him, it appears that in the early summer of 1969 respondent was en-

gaged in rendering more than normal legal services for the Black Panthers in Maryland. He joined members of the Black Panther Party on the streets of Baltimore in passing out editions of the Panther paper; he presided over political action classes of the Black Panther Party; and he took an active part in the activities of that Party there. He testified that he also traveled to many eastern United State cities, setting up police control districts, a project sponsored by the Black Panthers, and he advised the Party in connection therewith.

It was stipulated before the Maryland court that if the second trial of respondent were to proceed, the State's witnesses would testify to the following facts:

In early July, 1969, one Eugene Leroy Anderson joined the members of the Black Panthers Party and respondent in the distribution of Black Panther literature on the streets of Baltimore. On July 10 Anderson appeared at the Black Panthers' headquarters in Baltimore and became involved in an argument with certain members there. It appears that a Captain of the Panthers had been demoted and some members wanted him restored. There was also suspicion that some members were divulging to the police certain Black Panther activities. A number of Black Panthers forcibly carried Anderson upstairs, followed by respondent. There Anderson was slapped, punched and beaten. On one occasion he

fell against a file cabinet and respondent grabbed him and threw him to the floor, and another member kicked him in the groin causing him to yell out in pain. A cloth was stuck in his mouth to quiet him. Water in a pan was brought to boil, sugar was put into it and a hunting dagger was heated in it. The dagger was then placed in the skin under his eye and turned "rolling it down the face, which removed the first layer of skin on Anderson's face." The same thing was then done to his chest. A member took Anderson by the head, placed a .38 caliber revolver against it and said that he was going to kill him. Another member lit a cigarette and placed it against Anderson's face under his eye, burning him. Members present, including respondent, continued beating Anderson, sometimes with bed slats. Respondent then said, "We can't keep him here; we have to off him," meaning "We have to get rid of him [Anderson], we have to kill him." Anderson was kept there under guard all night and the next day, and was tied up and put in a closet. Anderson was called a "pig" who had been caught-- apparently squealing.

Two Black Panther members, Loney and Wyche, who had supported the demoted Captain, were berated by one Mitchell. Respondent was present at the time and encouraged Mitchell in his derogatory remarks against them. Mitchell and respondent told them that they could get back in the good graces of the Party by disposing of Anderson and respondent told them to "go ahead and do what they had to do with Anderson."

The State's Attorney stated to the court that Loney would testify that Wyche and he, with one Johnson, then drove out to find a spot where they could kill Anderson, and they found one. That night after respondent had finished presiding over a Black Panther political action class, he told Wyche and Loney to "go and do what you have to do," meaning "get rid of Anderson." Later that night, July 11, Wyche, Loney, Johnson, Young and another got a gun and took Anderson in an automobile to the spot previously selected. Loney stayed in the car while the others took Anderson into the woods. Loney heard the gun blast, and the escort soon returned without Anderson. Wyche reported that he had shot Anderson.

The State's Attorney stated that another witness, Barbara Zentz, would testify that she expected respondent to come to her house that evening on a social visit. He was late, and she fell asleep waiting for him. He came after 1:30 a.m. on July 12 and awakened her. He was extremely agitated and had a revolver in his hand which he waved, and he said that if "they" (meaning the authorities) came to get him, "he would take some of them with him." He asked her to hide him but she declined.

In October, 1969 the body of Anderson was found in Leakin Park, Baltimore, and it was duly identified.

On February 22, 1970 in Manhattan, New York the police, acting on a tip, apprehended four adults and found that one of them was carrying an automatic gun. They arrested the four and were about to place them in police cars to take them to the stationhouse when three other men appeared, one being Alan Weiser, a lawyer. He told the police that they had no right to arrest the four or take them in, and he stood between the men and the police cars to prevent such police action. The other two with Weiser aided him, and so the police also arrested the three. Weiser gave his address as 674 W. 161st Street, Apartment 6-G.

Officers Valois and Nichols then went to that apartment and kocked. Someone within asked who was there, and they replied "Police officers." It happened that there was an uncovered peephole in the door, and Officer Valois looked in and saw a man standing there holding a gun in his hand. The man (James Grace) dropped the gun and started running down the hall of the apartment. Officer Valois broke into the apartment and found that the gun was a M-1 carbine loaded with a banana clip of 30 rounds of bullets. He caught Grace in the kitchen and he called out that everyone was under arrest. Respondent and two girls then came out of a door near the kitchen. In the living room the officers saw a shotgun leaning against the window and 12 live shells on the windowsill; and they found on an end table two plastic

bags, one containing marijuana and the other 125 green pills. While Officer Nichols was lining up his prisoners he heard a door open to his left. He looked and saw into a room next to the kitchen holstered revolvers and bandoliers full of shells on top of a valise only about five feet from him. He immediately seized them.

Respondent then spoke up, saying, "What are you guys doing? All these guns are registered." Officer Nichols said, "What about the small guns?", and respondent answered,"These weapons are all mine and they are all registered." Respondent admitted that he and his girlfriend, whom he later married, were also living in the apartment.The officers found 75 hypodermic needles in the apartment; and they learned that the revolvers were not registered or licensed.

On February 23, 1970, Weiser and respondent were charged with possession of dangerous weapons, dangerous drugs, hypodermic instruments and obstructing government administration. Respondent pled not guilty and he was released on bail. His motion to suppress the guns, ammunition, drugs and his statements that the guns were his was denied.

On the mitigation hearing herein, respondent testified that in the course of his activities in behalf of liberal causes he made many speaking appearances and that in late April, 1970 he went to Montreal, Canada to make a speech at McGill University, intending

to return in a day or two. The fact that he was out on bail did not deter him from leaving the State without permission. He did not, however, speak in Montreal.

On May 1, 1970 respondent was indicted in Maryland along with Mitchell, Wyche and another for conspiring to murder Eugene Leroy Anderson on July 11, 1969; and he also was indicted with Mitchell and others for assaulting Anderson with intent to murder him and for common law assault. Respondent testified that McGill University cancelled his speech on learning of his indictment. Respondent learned of the indictment almost immediately and he testified that through an associate attorney in Baltimore he unsuccessfully negotiated to be released on bail if he returned to Maryland.

Respondent remained in Canada for 7 1/2 months. During this time he forged a lost identification card which came into his possession, falsifying it as his own, and he assumed the name of Leon Wright. He made no attempt to appear in the case pending against him in Manhattan and his bail there was forfeited. In mid-October, 1970 an official in Canada was kidnapped, a state of emergency was declared and the police investigated thousands of persons. In the course of this investigation, respondent was "picked up" and he gave his name as Leon Wright, using his false identification card. His identity was discovered, nowever; and the police, on

learning that he was under indictment for murder in Maryland, notified the Maryland authorities, and they began an extradition proceeding against him.

In the course of such extradition proceeding, respondent signed a waiver, and in mid-December, 1970 he returned to Maryland with two Maryland police officers, where he was kept in jail until the end of his three weeks' trial in June and July, 1971. The jury acquitted the other defendants indicted with respondent, but they disagreed as to him. He was then released on bail, awaiting a new trial, and in the following month he first came to Rochester, as before stated. Although the other above-mentioned persons indicted with respondent were acquitted, one Irving Young was tried separately for the murder of Eugene Leroy Anderson and he was convicted thereof.

In February, 1972 the State's case against respondent in Maryland came on for retrial. At that time on February 14, 1972 respondent was represented by Mr. Buchman of Baltimore and Mr. Kunstler of New York. Only one of the four indictments (Nos. 2313, 2314, 2315, 2316) against respondent was called for trial, to wit, No. 2314, and Mr. Buchman stated that respondent would plead guilty to the second count thereof, that is, common law or simple assault, in satisfaction of all the indictments against him. The State's attorney told the court that the State recommended accepting the plea, being mindful that the first trial took

three weeks and that the second trial would probably take longer, that respondent had already spent many months in jail awaiting the first trial, and that by pleading guilty to assault, respondent was exposing himself to sanctions by the Bar Association of the State of New York and would be subject to disbarment proceedings in New York. Before considering whether the court would accept respondent's plea with the State's approval, Presiding Judge J. Harold Grady had respondent sworn and he questioned him to ascertain whether his plea was voluntarily made. The court elicited that respondent was an attorney at law and fully acquainted with the law of his case and his legal rights and had thoroughly discussed his case with his attorneys before offering to make his plea and was doing so voluntarily.

The court then called upon the State's attorney to present for the record the evidence which the State asserted supported the guilty plea. The State's attorney stated that respondent's attorney had stipulated that the evidence which the State's attorney was about to recite, including the names of the respective witnesses, would be the State's proof if the case proceeded to trial, and respondent's attorney agreed that such was the stipulation. The substance of such testimony was set forth above in describing the events surrounding the beating and shooting of Eugene Leroy Anderson. The testimony

also described the use by respondent of the falsified identification card in Canada and the false name of Leon Wright and the fact that he remained in Canada for 7 1/2 months until termination of the extradition proceedings against him.

Following such statement of the State's evidence, Mr. Kunstler, for respondent, stated the nature of the evidence which the defense would present were the case to proceed to trial. He stated that he would present evidence to show that respondent was in New York City, not Baltimore, on July 10 through July 12, 1969; and Mr. Kunstler stated that respondent contends that "he was totally innocent of all the charges." The court then said:

> "It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the plea and that it was being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina v. Alford; It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant."
>
> * * *
>
> "As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts.

Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was a factual basis. But if Mr. Turco's position is he does not feel in any way that he has ever done anything wrong and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis."

MRS. O'CONNER: Correct. We would ask the entire portion starting 'If Mr. Turco were called to the stand . . .' to be deleted at this point and the plea continue with the completion of the last witness, Mr. Clark.

MR. KUNSTLER: I would agree to that.

The court then stated:

"So that there be no misunderstanding of the state of the record in this case, at the outset of the State's recital of its evidence there was a stipulation that this would be the State's evidence as produced on direct examination. There has been no

stipulation or agreement by the State as to what the evidence offered by the defendant might be, so that there has been no stipulation on the part of the State to any evidence which would support the outline as given by Mr. Kunstler. Since the State's outline of its evidence clearly supports the plea of guilty, the crime of assault, and since the defendant elects to present no evidence to controvert this charge, the Court finds that there is in fact a factual basis for the plea of guilty to the crime of assault."

Before pronouncing sentence, the court concluded as follows:

"As has been pointed out in the discussion here today, the defendant, Arthur Turco, is not a member of the Bar of the State of Maryland. However, I believe that there have been some suggestions that he has offered his services as an attorney to some persons in this jurisdiction who are charged with criminal offenses. The possibility of Mr. Turco participating in the defense of any criminal case in this State would depend upon his being presented to the Court by local counsel with a re-

quest that he be permitted to participate in that one case only on a case-to-case basis. Speaking for myself only, and not attempting to speak for any other court in this jurisdiction, I would make it clear that if such an occasion would arise in the future, Mr. Turco would not be permitted by this Court to act as counsel in any criminal case at trial before this Court."

On March 8, 1972 respondent appeared in the criminal court of the City of New York, New York County, and offered to plead guilty to illegal possession of a dangerous weapon, a gun, in satisfaction of all charges against him, including bail jumping and fleeing the jurisdiction. His attorney, Mr. Lefcourt, stated that respondent had no knowledge of the presence of the handguns or marijuana in his apartment where he was arrested and that the hypodermic needles were for respondent's use as a diabetic. He did not attempt to explain why 75 hypodermic needles were needed for such purpose. He asserted that his plea was under North Carolina v. Alford, (400 U.S. 25, supra) and that respondent still claims that he was innocent.

The District Attorney replied that the facts "clearly demonstrate the guilt of the defendant," and he proceeded to recite them, as reviewed above; but he concluded by stating that he was willing to accept the one

plea in full satisfaction of all charges against respondent. Respondent's attorney stipulated that the People's witnesses would testify to the facts recited by the District Attorney.

The court then questioned respondent and ascertained that his plea was made freely and knowingly; and he added, "After having entered this plea, do you understand I will not permit you to withdraw it under Alford v. North Carolina, on the basis of your assertion of innocence, later on?" and respondent answered, "I understand, your Honor."

Respondent appealed from the judgment convicting him in Maryland. The appeal was argued on March 2, 1973 and on June 13, 1973 the court of Special Appeals of Maryland affirmed the judgment.

Respondent appealed from the judgment convicting him in New York County of illegal possession of a dangerous weapon, and on December 19, 1972 the Appellate term of the First Department unanimously affirmed the judgment.

With respect to the New York County conviction respondent testified on the mitigation hearing that he had moved into the Manhattan apartment only a few days before his arrest; that he brought with him two guns, the shotgun and the rifle, which he had formerly used for hunting; and that he registered them when he moved to Manhattan. he stated that the revolvers and ammunition there-

for were in the room of his co-defendant, Weiser, in the apartment and their presence was unknown to respondent. He admitted that he had in the apartment up to 200 shells for his shotgun and up to 150 shells for his rifle. He testified that when he told the officers that the guns were his he was referring only to the shotgun and rifle and not to the unlicensed revolvers, despite the officer's testimony that respondent's statement was in response to his question about the small guns. Respondent offered no explanation of how the shotgun and the rifle, purportedly used only on rare occasions for hunting, wer both in the living room with live ammunition in them and openly at hand.

Respondent further testified that the reason he falsified the identification card in Canada and carried it and used the name of Leon Wright was to avoid arrest and extradition to the United States.

Respondent reiterated on cross-examination that he pled guilty in Maryland and in New York County with full knowledge of the charges, facts and law and did so voluntarily and on advice of his counsel.

The essence of respondent's testimony on the mitigation hearing was (1) that because of his active defense of minority persons in Maryland, especially blacks, he could not get a fair trial there, and that is principally why he pled guilty rather than stand trial.

His wife's ill health and his lack of funds for counsel fees for his defense were also stated as important considerations; (2) that his wife's ill health and the expense of defending himself against the New York County charges were also why he pled guilty there; (3) that he has been devoted to the defense of minority groups and underprivileges persons, largely without fee, and has performed a public service for which he should be commended instead of being charged with unprofessional conduct; and (4) that since his convictions he has conducted himself in an exemplary manner, continuing to defend the poor and defenseless and unpopular causes, and should be permitted to continue to do so.

The petition herein charges respondent with misconduct by reason of the two convictions above described. We have determined that such misconduct requires that he be disciplined. In an effort to mitigate the discipline to be adjudged, respondent presented his version of the facts underlying and surrounding the convictions. In considering such testimony we necessarily have reviewed the countervailing proof, to wit, the facts which the State of Maryland and the People of New York stated that they would prove upon a trial to establish respondent's guilt, many of which facts were admitted by respondent or not denied. Those alleged facts and respondent's answers thereto are necessarily weighed by us in considering respondent's character and his respect for the law and his responsibility to the Bar as a lawyer.

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The Maryland court accepted the recommended plea of common assault; but it clearly did not view the crime as a mere street corner fist-fight, for it imposed a five-year sentence, suspended during respondent's good behavior. After respondent's arraignment in New York County on the various charges there, the court recognized respondent's position as a member of the Bar and released him on bail on his own recognizance, thus relying on his integrity as an attorney-at-law to abide by the rules governing persons released on bail and to be available at all times for the prosecution of the case. Under such circumstances his admitted jumping bail, which in itself constituted the commission of a felony (Penal Law §205.40), shows a significant lack of good character. Although this fact is not a basis upon which the petition rests, in his testimony in mitigation respondent has adverted to his incognito stay in Canada, and such testimony must be considered in light of all the surrounding facts.

The evidence in behalf of respondent shows that he engaged in representing people who desperately needed representation and who often had difficulty finding able counsel, and that he, as an attorney, had a proper concern for underprivileged persons. The testimony of the many witnesses who testified to respondent's good character must, however, be recognized as based upon his conduct since he came to Rochester in 1971, during which time he was subject to the Maryland and New York County charges or

the pressure of the Bar Association's investigation for his prior misconduct. Were the admitted facts in this proceeding to appear on the record of an applicant for admission to the Bar, without doubt the application would be summarily denied.

In his argument in mitigation of respondent's conduct and consequent punishment, his counsel likens respondent's actions to those of an attorney who has been charged with tax fraud or tax evasion. We cannot accept such comparison. Defendant has been charged with crimes involving gross moral turpitude, including violence and a display of utter lack of moral responsibility. Even in his testimony at the mitigation hearing he evinced no showing of remorse or recognition of wrongdoing. Respondent's conduct in 1969 and 1970, as recited above, reveals that he had little respect for legal processes insofar as they applied to him and his ambitions. He left the arena of the lawyer in the proper defense of clients charged with crime and joined his clients in criminal activity and when caught in the web of the law, he refused to abide by lawful mandates and undertook illegal means to evade the law and conceal himself. He flouted the law. His actions were completely un-lawyer-like, unprincipled and far below any minimum standard of proper professional conduct. Such conduct in a practicing lawyer cannot be tolerated. For his admitted actions herein we have no choice

but to order that he be disbarred and that his name be stricken from the roll of attorneys of the State of New York.

An order should be entered accordingly.

Marsh, P.J., Moule, Simons, Mahoney and Del Vecchio, J.J., concur.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of February A.D. 1975.

PRESENT, Hon. Charles D. Breitel, Chief Judge, presiding.

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4 No. 154

In the Matter of Arthur F. Turco, Jr., Appellant,

vs.

Monroe County Bar Association, Respondent.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied, and it is

ORDERED, on the Court's own motion, that the appeal taken as of right be dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Clerk

THE RIGHT TO APPELLATE REVIEW IN NEW YORK : DISCRIMINATION BETWEEN ATTORNEYS AND ALL OTHERS

A. Professionals

Profession	Statutory Trier-of-Fact	Court of Appellate Review as of Right	Scope of Appellate Review as of Right
1. Attorneys	Appellate Division (Judiciary Law §90)	None - but leave to appeal may be addressed to Court of Appeals (Judiciary Law §90(8))	None as to facts; none as to law except when a constitutional issue is the only question or when a Justice of the Appellate Division dissents
2. Physicians, Chiropractors, Engineers, Accountants, Nurses, and all others	Board of Regents (Education Law §6510(3))	Appellate Division, Third Department (Education Law §6510(4))	All questions of law and "substantial evidence" test as to facts

covered by
Education Law
§6500-8208

B. Civil Litigants

Statutory Trier-of-Fact	Court of Appellate Review as of Right	Scope of Appellate Review as of Right
1. Supreme Court	Appellate Division (CPLR §5701(a))*	Questions of law and questions of fact (CPLR §5501(c))
2. County Court	Appellate Division (CPLR §5701(a))	Questions of law and questions of fact (CPLR §5501(c))
3. Family Court	Appellate Division (Family Court Act §1111)	Questions of law and questions of fact (CPLR§5501(c))

* "CPLR" refers to New York Civil Practice Law and Rules.

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Statutory Trier-Of-Fact	Court of Appellate Review as of Right	Scope of Appellate Review as of Right
4. Surrogate's Court	Appellate Division (Surrogate's Court Act §2701)	Questions of law and questions of fact (CPLR §5501(c))
5. Court of Claims	Appellate Division, Third or Fourth Department (Court of Claims Act §24)	Questions of law and questions of fact (Court of Claims Act §24)
6. District Court	Appellate Term or County Court (Uniform District Court Act §1701)	Questions of law and questions of fact (CPLR §5501(d))
7. Civil Court, City of New York	Appellate Term (NYC Civil Court Act §1701)	Questions of law and questions of fact (CPLR §5501(d))
8. Other City Courts	Appellate Term or County Court (Uniform City Court Act §1701)	Questions of law and questions of fact (CPLR §5501(d))

Statutory Trier-of-Fact	Court of Appellate Review as of Right	Scope of Appellate Review as of Right
9. Justice Court	Appellate Term or County Court (Uniform Justice Court Act §1701)	Questions of law and questions of fact (CPLR§5501(d))
	C. Criminal Defendants	
1. Supreme Court	Appellate Division (CPL §450.60(1))*	Questions of law and issues of fact (CPL §470.15(1))
2. County Court	Appellate Division or Appellate Term (CPL §450.60(2))	Questions of law and issues of fact (CPL §470.15(1))
3. District Court	County Court or Appellate Term (CPL §450.60(3))	Questions of law and issues of fact (CPL §470.15(1))

* "CPL" refers to New York Criminal Procedure Law.

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Statutory Trier-of-Fact	Court of Appellate Review as of Right	Scope of Appellate Review as of Right
4. Criminal Court, City of New York	Appellate Term (CPL §450.60(4))	Questions of law and issues of fact (CPL §470.15(1))
5. Other City Courts	County Court or Appellate Term (CPL §450.60(3))	Questions of law and issues of fact (CPL §470.15(1))
6. Justice Court	County Court or Appellate Term (CPL §450.60(3))	Questions of law and issues of fact (CPL §470.15(1))

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74-1592

Supreme Court, U. S.
FILED
JUN 18 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ARTHUR TURCO, JR.,
Petitioner,

v.

MONROE COUNTY BAR ASSOCIATION
OF THE STATE OF NEW YORK,

Respondent.

BRIEF OF NATIONAL LAWYERS GUILD
AS AMICUS CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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BRIEF OF NATIONAL LAWYERS GUILD
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PETITION FOR WRIT OF CERTIORARI*

INTEREST OF NATIONAL LAWYERS GUILD

The National Lawyers Guild is an association of lawyers, law students and legal workers that has been in existence for over thirty-eight years and has active chapters and thousands of members throughout the United States. The Guild, since its inception during the depths of

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* Letters from the respective parties consenting to the submission of this amicus have been filed with the Clerk of this Court.

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the depression, has sought to insure that all Americans, regardless of the type of work they do, the color of their skin, their religious preference, their place of national origin, or their political beliefs,receive their full and unabridged constitutional rights.

During this period of time Guild attorneys have been active in representing thousands of individuals who have espoused unpopular political points of view. Much of the legal work done for such individuals has been to insure them the rights to present their points of view and to protect them against illegal or unconstitutional actions on the part of individuals or governmental instrumentalities who sought to intimidate or silence them. That there have been many such illegal and unconstitutional actions

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conducted by governmental agencies against political dissidents, including their attorneys in recent years, is public knowledge and is a shameful chapter in our country's history.

We are particularly interested in this case because it raises a fundamental question for our members and for all attorneys who either voluntarily undertake to represent the poor and the oppressed or who take such cases when assigned by a local Bar association.

ARTHUR F. TURCO, JR., the petitioner in this case, like so many other attorneys in the United States, commenced practicing the profession of law during the turbulent decade of the 1960's. During the course of practicing his profession, he represented civil rights and anti-war activists, often for no fee.



On two occasions, due to the nature of his legal work, he found himself the target of criminal proceedings. Throughout these proceedings, he vigorously professed his innocence. As explained in the Petition, he pled guilty on both occasions to misdemeanors with a strong insistence of his innocence and with the understanding that if charges were ever brought against him as to his fitness to practice law as a result of his convictions, he would have a full hearing where the facts and circumstances of his pleas of guilty could be explored.

Mr. TURCO's reputation as an advocate of the poor, the oppressed and the unpopular is well known; that he has been disbarred, without even a due process hearing by the Appellate Division has caused serious concern within the legal community.

The National Lawyers Guild has frequently submitted amicus briefs in similar cases where issues presented to the Court are of broad public importance.

REASONS FOR GRANTING THE WRIT

The history of this case is reviewed in detail in the main Petition; that statement is adopted herein.

Unless reviewed by this Court, the decision below seriously erodes basic constitutional rights that all citizens of our country enjoy and makes it extremely difficult for citizens who espouse politically unpopular points of view to obtain the effective assistance of counsel. United States v. Mitchell, 354 F.2d 767 (2nd Cir. 1966).

This Court has recognized on many occasions that the rights of our citizens to enjoy their property and their liberty

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cannot be abridged without due process of law. It is a statement that all Americans are familiar with and which understandably gives them a sense of security that their rights will not be taken away in any arbitrary or capricious manner without their being afforded an opportunity to be heard and to participate fully in the deliberations. The right to participate in such deliberations is a fundamental right given by our Constitution to all citizens.

That ARTHUR F. TURCO, JR.'s right to practice law, to earn a livelihood in a profession for which he spent many years training, to provide financial support to his wife and two infant children and to represent persons who have politically unpopular points of view has been taken away without a scintilla of due process

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outrages the very conscience of the legal community. Mr. TURCO pled guilty to two misdemeanors neither of which had anything to do whatsoever with his ability to function as an attorney.

In both cases, he pled guilty while vigorously protesting his innocence, a procedure clearly sanctioned by this Court in Alford v. North Carolina, 400 U.S. 25 (1970). The Petitioner had every right to expect that if any proceedings were commenced against him challenging his right to practice law, he would be afforded a due process hearing. In the instant case, he did not receive a fair hearing; in fact, he received no hearing at all.

This Court is the ultimate authority on the practice of law in our country. There are three basic areas which deal

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with the control that the courts have over who practices law: admissions policies, the power of contempt and disbarment. During the last few years the Court has dealt with a number of cases involving admission policies and contempt. This case deals with disbarment. If the Court does not hear this case, then it might, unfortunately, be interpreted as a signal to others that the behavior of the Appellate Division with reference to Mr. TURCO is being condoned and that other jurisdictions may feel free to deal summarily with attorneys who represent clients with unpopular points of view.

CONCLUSION

For the reasons set forth herein, the writ of certiorari should be granted to review the judgment and opinion of the Appellate Division: Fourth Department of the Supreme Court of the State of New York.

Respectfully submitted,

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OF COUNSEL:

Harold A. Mayerson

Dated: New York, New York
June 16, 1975

CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the foregoing Brief of the National Lawyers Guild as Amicus Curiae have been served by mail, postage prepaid, this 16th day of June, 1975 upon the following:

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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1974

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Petitioner,

vs.

MONROE COUNTY BAR ASSOCIATION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION FOURTH JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The unreported opinions of the New York State Appellate Division of the Supreme Court, Fourth Department, dated December 17, 1973 and January 28, 1975 appear in petitioner's appendix (7a-35a). The unreported order of the New York Court of Appeals dated February 19, 1975, denying petitioner's motion for leave to appeal and dismissing the appeal taken as of right "upon the ground that no substantial constitutional question is directly involved," also appears in petitioner's appendix (36a).

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Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether there is a rational basis for New York's procedure for disciplinary action against New York attorneys whereby the proceeding is initiated before the Appellate Division of the Supreme Court and appeals to the Court of Appeals are available (a) as of right where one or more of the five justices of the Appellate Division dissents from the decision of the court; (b) as of right where the appeal presents a question under the Constitution of the State or of the United States; and (c) by leave of either the Court of Appeals or the Appellate Division.

2. Whether the New York Appellate Division may adjudge a lawyer guilty of professional misconduct upon the basis of a conviction on a plea of guilty to the misdemeanor of common law assault in Baltimore, Maryland and a conviction on a plea of guilty to the misdemeanor of possessing a dangerous weapon in New York City, holding such convictions to be binding and conclusive, in spite of an assertion of innocence at the time of one of the two pleas.

3. Whether petitioner's rights under the Due Process clause were violated where the proceedings against him were initiated by a written petition, and he was afforded the opportunity to submit a written answer and present oral and written arguments prior to any adjudication of professional misconduct, the opportunity to present testimony at a mitigation hearing, the opportunity to review and respond to the written report by the justice presiding at the mitigation hearing and the opportunity to present written briefs and make oral arguments before the determination of any discipline.

Constitutional and Statutory Provisions Involved

Article 6, Section 3 of the New York State Constitution is set forth in petitioner's appendix at 2a — 5a; Section 90, paragraphs 2 and 8 of the New York Judiciary Law are set forth in petitioner's appendix at 6a. Paragraphs 1(a), 3, 6 of Section 90 are set forth in respondent's appendix at B-1 — B-2. Section 1022.9 of the New York Code of Rules and Regulations (Rules promulgated by the Supreme Court, Appellate Division, Fourth Department) is set forth in respondent's appendix at B-2 — B-3. Sections 5601, 5602, 5612 of the New York Civil Practice Laws and Rules are set forth in respondent's appendix at B-4 — B-7.

Statement of the Case

Petitioner, Arthur F. Turco, Jr., an attorney admitted to practice in New York State on December 21, 1967, was disbarred and removed from the roll of New York attorneys by order of the New York State Supreme Court, Appellate Division, Fourth Department, dated January 28, 1975. During the course of the disciplinary proceedings, begun by written petition dated May 8, 1973, petitioner was afforded several opportunities to present oral and written arguments to the Appellate Division and to present testimony and other evidence in mitigation of the matters charged in the petition against him. After consideration of the undisputed allegations in the petition, the evidence offered in mitigation at the hearing afforded to petitioner, and the oral and written presentations of counsel, the Appellate Division, exercising its discretion as to the appropriate sanction under the circumstances, entered its order of disbarment.

The disciplinary proceedings were set in motion on April 4, 1972 when the Appellate Division ordered the Monroe County Bar Association to conduct a preliminary investigation of the professional conduct of petitioner and, if warranted by its in-

vestigation, prepare, serve and file charges. (Complaint, Attachment A.)* On May 8, 1973 the Bar Association served a written complaint setting forth specific charges and requesting the Appellate Division to "make such order with respect to [Turco's] license to practice as an attorney and counselor-at-law as it deems proper and to take such other and further proceedings as to the Court may seem just and proper." The allegations central to the complaint were as follows:

> 5. On or about May 1, 1970, respondent, together with certain other individuals, was indicted in Baltimore, Maryland, in connection with the slaying of one Eugene Leroy Anderson on July 12, 1969. Specifically, respondent was charged with conspiracy to commit murder (indictment 2313), assault with intent to murder (indictment 2314, first count), common law assault (indictment 2314, second count), soliciting to commit a felony [murder] (indictment 2315), and soliciting to commit a felony [kidnapping] (indictment 2316). The aforesaid indictments are attached hereto as Exhibits "B", "C", "D", and "E" respectively.

---

* The petition of the Bar Association will be referred to as the "complaint"; the petition for a writ of certiorari will be referred to as the "petition." Respondent has requested the Clerk of the Appellate Division to transmit the following parts of the record, which will be referred to by the designations below:

Petition of the Bar Association	"Complaint"
Answer of Arthur F. Turco, Jr.	"Answer"
Transcripts of testimony at the hearings in mitigation	
Volume 1 March 28, 29, 1974	"T1"
Volume 2 April 4, 5; May 2, 3, 1974	"T2"
Volume 3 May 21, 1974	"T3"
Report of hearings in mitigation by Justice Lyman H. Smith	"Report"
Exhibit C at the mitigation hearings consisting of the decision of the Court of Special Appeals of Maryland	"Exhibit C"

6. On February 14, 1972 respondent entered a plea of guilty to the second count of indictment 2314, common law assault, in satisfaction of all pending charges. The transcript of proceedings on February 14, 1972 in the Criminal Court of Baltimore is attached hereto as Exhibit "F".

7. Respondent was sentenced to a term of five years in the custody of the Department of Correction but such sentence was suspended (Exhibit "F", p. 47).

8. Respondent filed an appeal to the Court of Special Appeals of Maryland in proper person. The Appeal was argued orally on March 2, 1973. No decision has yet been rendered.*

* * *

10. On February 22, 1970 respondent was arrested in New York City and charged with possession of weapons, possession of dangerous drugs, possession of hypo instrument and obstructing Government administration. A report of such arrest by the New York City Police Department is attached hereto as Exhibit "H".

11. On March 8, 1974 respondent entered a plea of guilty to a violation of section 265.05 of the Penal Law (no specified subdivision) as a misdemeanor and on April 3, 1972 was conditionally discharged. The transcript of record of the Criminal Court of the City of New York is attached hereto as Exhibit "I".

12. A certified copy of the court record in the Criminal Court of the City of New York and the affidavit in support of the charges against respondent are attached hereto as Exhibit "J". The Decision of Justice Jack Rosenberg denying a motion to suppress certain evidence and certain admissions is attached hereto as Exhibit "K". The stenographic minutes of proceedings on March 8, 1972 when

*The judgment of conviction was affirmed on June 13, 1973. See Exhibit C.

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respondent entered a plea of guilty of unlawful possession of a weapon in violation of section 265.05 is attached as Exhibit "L".

13. Respondent appealed his conviction to the Appellate Term, First Department, which unanimously affirmed said conviction without opinion on December 19, 1972.

14. By reason of the foregoing, petitioner submits that respondent is or may be guilty of professional misconduct, crime, misdemeanor or felony.

On June 21, 1973 Mr. Turco filed a 61-page answer (with lengthy attachments) which, without denying any of the allegations in the petition, reviewed his personal history, his involvement with the defense of various Black Panther cases, his weapons arrest in New York City, his trip to Canada, his first trial on the charges related to Eugene Anderson, and his reasons for his pleas in New York City and Baltimore. Mr. Turco concluded his answer with the request that a hearing be conducted before a judicial officer and that he be allowed to assert his innocence of the charges to which he pled guilty in Baltimore and New York.

On December 17, 1973, after the submission of written briefs and the presentation of oral arguments by counsel, the Appellate Division denied Mr. Turco's request to dismiss the charges or to require the relitigation *ab initio* of the charges in Baltimore and New York City to which Mr. Turco had entered guilty pleas. The Court dismissed Mr. Turco's arguments as follows:

> "Although respondent suggests that his pleas were reluctantly made and were similar to pleas *nolo contendere* and hence of no effect in another proceeding (see *Matter of Kimball*, 33 N.Y. 2d 5) the plea of *nolo contendere* has been abolished in New York (*Ando v. Woodberry*, 8 N.Y. 2d 165, 170), and the records of respondent's pleas now show conclusively that they were nothing less than pleas of guilty to reduced charges. In the absence of a contention that respondent has evidence

> 'which was unavailable to him' at the time of those pleas (see *Matter of Keogh*, 17 N.Y. 2d 479, 481), we deem the two convictions to be final and binding upon him."

Based upon the undisputed fact of the two convictions, the Court found that "these acts of which respondent stands convicted constituted professional misconduct" and "illegal conduct involving moral turpitude or that is prejudicial to the administration of justice or that adversely reflects on his fitness to practice law." The Court further held that Turco should be disciplined for such misconduct and afforded him a hearing "in mitigation of the discipline to be adjudged." (See 22 NYCRR § 1022.9(c); B-3.)

Hearings in mitigation were conducted before Justice Smith on March 28 and 29, April 4 and 5, and May 2, 3 and 21, 1974. Over eight hundred pages of testimony were taken. Justice Smith submitted a report to the Appellate Division dated October 25, 1974 without recommendation. Mr. Turco presented, in addition to evidence with respect to his character and ability as an attorney, testimony as to his asserted innocence of the charges which were the basis for his convictions in Maryland and New York City.

After receiving Mr. Turco's extensive brief and conducting oral argument in Chambers, the Appellate division issued an opinion dated January 28, 1975 finding that Mr. Turco should be disbarred. The opinion of the Appellate Division sets forth in detail the factual basis for Mr. Turco's disbarment and the facts will not further be repeated herein (See Petitioner's appendix, pp. 13a-35a).

Mr. Turco thereafter both served a notice of appeal to the Court of Appeals and also moved in the Court of Appeals for an order granting leave to appeal. By order dated February 19, 1975 the Court of Appeals denied Mr. Turco's motion for leave to appeal and, upon the Court's own motion, dismissed the appeal taken as of right "upon the ground that no substantial constitutional question is directly involved." (Petitioner's appendix, p. 36a)

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ARGUMENT

POINT I

The questions presented by petitioner are plainly insubstantial.

A. *New York's procedures for appellate review of disciplinary action against attorneys do not violate the due process or equal protection guarantees.*

There is no merit in petitioner's argument that an attorney is arbitrarily and capriciously denied the right of appeal from disciplinary action ordered by the Appellate Division. An attorney subject to disciplinary action may appeal to the Court of Appeals in exactly those situations in which other litigants may appeal from an order of the Appellate Division entered in a proceeding initially commenced before that Court: (a) where there is a dissenting vote among the five justices of the Appellate Division; (b) where leave to appeal is granted either by the Appellate Division or by the Court of Appeals; or (c) where the appeal presents a question under the constitution of New York or the United States. New York State Constitution, Article 6, Section 3 (McKinneys 1969); N.Y. Judiciary Law §90 (subd. 8) (McKinneys 1968); N.Y. CPLR 5601, 5602 (McKinneys 1974-1975 Supp); E.g., *Matter of Zuckerman*, 20 N.Y. 2d 430, 285 N.Y.S. 2d 1, 231 N.E. 2d 718 (1967); *Matter of Barash*, 19 N.Y. 2d 833, 280 N.Y.S.2d 398, 227 N.E. 2d 313 (1967); *Matter of Mathot*, 222 N.Y. 8, 117 N.E. 948 (1917); See, *Javits v. Stevens*, 382 F. Supp. 131, 141-142 (S.D. N.Y. 1974).

The legislative determination to vest the Appellate Divisions of New York's four judicial departments with authority for the admission and the removal of attorneys is clearly a reasonable and legitimate procedure for fulfilling New York's obligation to regulate the professional standards of attorneys practicing

before its courts. That the courts are the appropriate bodies to perform this function is not subject to serious debate. Nor can there be a serious challenge to the legislative basis for vesting the administration of such procedure in the four intermediate courts as opposed to the numerous courts of original jurisdiction, an administrative agency, or the highest appellate court. Although the consequence of vesting these matters with New York's intermediate courts, and attaching the same right of appeal to its highest court as that available in other instances, is that attorneys do not have a "review" in the Appellate Division, they have the unusual opportunity of an initial decision on the law and facts by five appellate justices. Thus, it is clear both that New York provides ample channels for review in the Court of Appeals and that New York's procedure bears a reasonable relationship to the permissible legislative goal of adopting a fair and workable system for regulating the professional standards of attorneys.

Although New York provides a procedure for disciplinary action against attorneys that differs in some of its procedural incidents from the procedure for disciplinary action against other professionals and from the procedure for criminal defendants and civil litigants, it is not the case that the legislative classification lacks appropriate justification. Different procedures may of course be provided for different classes of people. *Semler v. Board of Dental Examiners*, 294 U.S. 608 (1935); *Pordum v. Board of Regents*, 491 F.2d 1281 (2d Cir. 1974).

Arguments closely similar to those raised in the petition were shortly disposed of in *Javits v. Stevens*, 382 F. Supp. 131 (S.D. N.Y. 1974). In *Javits*, as here, the argument was made that New York's procedures for disciplinary action against attorneys violate the due process or equal protection clauses. The district court found that due process "has never been held to require that a state provide appellate courts or a right to appellate

review" (382 F. Supp. at 140) and held, moreover, that New York's review procedure for its disciplinary proceedings is consonant with due process. (382 F. Supp. at 140.) The district court also found the equal protection claims presented here to be without merit. The reasoning in *Javits* plainly shows the lack of merit in petitioner's present contention.

B. ***New York's procedure permitting petitioner a hearing on mitigation, but not an opportunity to relitigate his criminal convictions, fully complies with due process.***

There is no validity to the argument that New York may not, as a matter of substantive state law, hold that evidence of conviction of a crime stands as proof of the commission of the underlying criminal act. See *Matter of Levy v. Assoc. of the Bar of the City of New York*, ——N.Y.2d—— (7-10-75). As petitioner concedes, New York's rule comports with the "general direction of the law . . ." (Petition, p. 26.)

Petitioner is simply mistaken in his reading of *North Carolina v. Alford*, 400 U.S. 25 (1970). This Court in *Alford* held that a state may accept a defendant's plea of guilty to a reduced charge, in spite of a protestation of innocence, if the "defendant intelligently concludes that his interests require entry of a guilty plea and the record before the Judge contains strong evidence of actual guilt." (400 U.S. at 37.) Although the question of collateral consequences of the conviction was not raised in *Alford*, nothing intimated there forbids New York from attaching evidentiary weight to the conviction where, as here, the pleas were intelligently made and the records contained strong evidence of guilt.

Petitioner cannot contend that he was misled or entrapped regarding the collateral consequences of his plea to criminal charges. The prosecuting attorney in the Maryland proceedings stated that one of the considerations for accepting petitioner's plea to a reduced charge was ". . . [that] by pleading guilty to

assault Mr. Turco is exposing himself to the sanction by the Bar Association of the State of New York and will be subject to disbarment procedures in that State." (Complaint, Attachment F, p. 6.) Similarly, in the New York proceedings, where petitioner did assert his innocence when making his plea, the prosecutor made the following statement in recommending sentence:

> Mr. Corriero: Your honor, I believe, is aware that defendant is an attorney and an officer of the Court and admitted to practice in the State of New York. I believe, under the circumstances, that the charges against the defendant are extremely serious, and that the Court should consider this in imposing sentence on this defendant. (Complaint, Attachment 2, p. 5.)

Petitioner was given ample opportunity to be heard on whether his convictions evidenced moral turpitude and on the appropriate degree of discipline. Written charges were made and sustained, after briefs and oral argument, when petitioner's pleading presented no factual issues on the charges made in the complaint. Petitioner exercised his right to a hearing on issues in mitigation and, after receiving the written report of the justice who conducted the hearing, presented oral and written arguments to the Appellate Division on the appropriate discipline. Accordingly, petitioner had notice and an opportunity to be heard before collateral consequences were attached to his two convictions.

Fundamental fairness does not require more. Petitioner waived his opportunity to litigate his guilt or innocence with all the procedural safeguards attached to a criminal trial. His pleas were supported by strong evidence of actual guilt. He does not claim that he has evidence which was unavailable to him at the time of his pleas. *cf. Matter of Keogh*, 17 N.Y. 2d at 481. His present justifications for his pleas have been weighed against other circumstances revealed by the transcripts of the proceedings when the pleas were entered. For all of these reasons, his due process arguments are specious.

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C. ***Petitioner had adequate notice and opportunity to be heard as to both the charges of professional misconduct and the matters in mitigation.***

As previously indicated, petitioner was afforded various opportunities to be heard on whether his convictions evidence professional misconduct and he was granted a factual hearing on matters in mitigation. There is certainly no basis in fact for his legal argument that he was denied the procedural elements of due process as to the charges of professional misconduct or as to the scope of the hearings in mitigation.

Although petitioner now objects to the Appellate Division's subsequent consideration of the nature of the charges against him in New York and Maryland and the factual support presented by the prosecuting attorneys at the time of petitioner's plea to reduced charges, it is apparent that these matters were integrally related to petitioner's assertions in mitigation. Petitioner, while asserting his innocence of all charges in Maryland on the ground of an alibi and while asserting his innocence of all charges in New York (with the possible exception of a charge for "bail-jumping" [See T1 97-99]) on various grounds, claimed that his plea of guilty in each instance was motivated by ill health, lack of funds, hostile judicial attitudes, and the like. It thereby became necessary for the Appellate Division to consider the totality of the circumstances of those pleas, including the nature of the underlying charges, the factual foundations offered by the prosecutors, and the prosecutor's reasons, stated on the record, for recommending the acceptance of a plea to a reduced charge. Such consideration, as reflected in the Appellate Division's opinion, clearly established that the plea was motivated, in part, by one factor in addition to those advanced by petitioner: the strong factual support for the prosecutor's case.

The charge of "bail-jumping" (N.Y. Penal Law §§215.56 and 215.57 (McKinney 1975)) is but one example of a matter

otherwise collateral to the charges of professional misconduct made relevant by petitioner's explanation of his motivation in entering a guilty plea in New York. On this subject, petitioner testified as follows (T1 97-99):

> Q. Now, you have disposed of your Baltimore case and tell us about the disposition of the case in New York City. Who was representing you in New York? A. In New York, Gerald Lefcourt represented me in New York.
>
> Q. And tell us about that. A. When we went back in March to finish up in New York, eight people in all that were arrested in that apartment that night, all the charges were dropped against everybody except me. I was the only one they had charges on. The district attorney stated very clearly that there was no evidence that I lived there; in fact, there was evidence to the contrary that I did not live there. I was just staying there for a while. However, they did add a charge against me for bail jumping when I was in Canada in Montreal. The New York case was continuing and I did not appear. Other persons, I understand, had been there had warrants against them, the cases were finally dismissed against everybody except me, and so I went back to New York in March. The district attorney informed me that they had added another charge to me of bail jumping.
>
> So I was in New York and I spoke with Gerald Lefcort about what we should do. There was no doubt in my mind that we could prove my innocence of the gun charges. There was no doubt in my mind. The only question was whether or not, what we could say about bail jumping was that defensible position because I was in Canada when I was supposed to appear in New York, and we had thought it would be advisable to avoid that issue since that issue might tend to include a moral turpitude issue, and it was resolved again with the district attorney that I took a plea under the Alford case, where I maintained my innocence and which was put in the record.

I took a plea to the weapons charge basically for the same reason that transpired in Maryland. I had had it. I just could not endure it any longer. Our lives, my wife's and mine, were totally chaotic. I was still living in tension and fear of threats and the entire episode in Maryland. I just could no longer endure it. I could no longer take it.

Q. Was bail jumping charge dismissed? A. Yes, the bail jumping charge and all the rest of the charges were dismissed.

Q. What was the disposition of the case in New York City? A. I took a plea to a misdemeanor, possession of weapons, and I received a conditional discharge of three years.

It is also apparent that petitioner introduced the subject of his "stay in Canada" in his verified answer (Answer, pp. 21-23) and in direct examination at the mitigation hearing (T1 55-60). Because this subject was introduced by petitioner as part of his own explanation for his activities, it was a proper subject for cross-examination and for consideration by the Appellate Division as relevant to mitigation.

Indeed, the cross-examination on this subject dramatically contrasted with the vague explanations of his activities in Montreal made in the answer and on direct examination. While petitioner asserted that he made a "difficult decision" and stayed in Canada after he learned in April, 1970 that he was wanted in Maryland (T1 55-58) and returned "voluntarily" after extradition proceedings had been begun (T1 59-60), the cross-examination added further damaging details. Petitioner went to Montreal to give a speech at McGill University, a speech which was cancelled after petitioner learned that he was being sought by authorities in Maryland (T2 316, 318). Petitioner's stay in Montreal was not motivated by any activity there (T2 324-325) other than his desire to avoid arrest and extradition (T2 330-347). Petitioner found a wallet containing an iden-

tification card for one "Leon Wright" (T2 326-331), which he used when apprehended by Montreal authorities during measures taken under emergency powers in October, 1970 after two diplomats were kidnapped (T2 334). Montreal authorities, however, discovered his identity and alerted Maryland. Only after extradition proceedings were actually begun did petitioner waive extradition and return to Maryland "voluntarily" with a police escort (T2 372).

The facts of this proceeding, therefore, are radically different from the situation in *In re Ruffalo*, 390 U.S. 544 (1968), where this Court held that an attorney subject to disciplinary proceedings was entitled to fair notice of the charge. In *Ruffalo* the sole charge of misconduct on which Ruffalo was disciplined was added out of his testimony in defense of other charges. The nature of that charge and the manner in which it had been introduced made it clear that Ruffalo did not have adequate notice or opportunity to present his defense. Here, petitioner was charged on two specific counts which the Appellate Division found to be sufficient. He was thereafter aware that the hearing in mitigation would encompass the matters of which he now complains because he introduced these subjects in his own pleading. Accordingly, while petitioner has correctly stated the abstract principle of *Ruffalo*, the principle has no application here.

POINT II

The questions sought to be raised by petitioner are not in fact presented on this record.

Petitioner's claim that he entered an "*Alford* plea" to the Maryland charges is patently untrue. The transcript shows that after the court ascertained that the petitioner was an attorney in New York and that he was making the plea voluntarily, with complete knowledge of the consequences, the defense counsel

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stipulated to the prosecutor's description of the testimony and evidence that would be introduced at trial. In *mitigation* of sentence, counsel described the proof that the defense would present to counter the state's case, but the state objected to the defense counsel's declaration of the defendant's belief in his innocence. The assertion of innocence was stricken from the record (Complaint, Attachment F, pp. 41-42) after a conference at the bench during which the following transpired (*Id.*, pp. 40-41):

> THE COURT: It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the plea and that it was being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina vs. Alford. It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant.
>
> MR. KUNSTLER: I don't think we have really said there is a conflict with that aspect.
>
> * * *
>
> THE COURT: As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts. Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was factual basis. But if Mr. Turco's position is he does not feel in any way that he has ever done anything wrong and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis.
>
> MRS. O'CONNOR: Correct. We would ask the entire portion starting "If Mr. Turco were called to the stand . . ." be deleted at this point and the plea continue with the completion of the last witnesses, Mr. Clerk.
>
> MR. KUNSTLER: I would agree to that.

It is clear that the court, the prosecutor and the defense counsel all understood that petitioner did not enter an "*Alford* plea."

Petitioner cannot claim surprise or entrapment from the use of his convictions in a subsequent disciplinary proceeding because their probable collateral consequences were made explicit to him at the time of entry of his pleas. For the reasons previously indicated (supra, p. 11), this is not a case of a criminal defendant unfairly caught by unforseeable consequences of a guilty plea.

POINT III

The questions presented by petitioner do not merit the attention of this court.

A. *The substantive issues involved in New York's attorney disciplinary procedures are outside the scope of this court's jurisdiction.*

This Court has consistently given the states wide latitude in their control over standards for the bar, except where important constitutional rights have been jeopardized. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 248-249 (1957) (Concurring Opinion). The federal courts have held fast to this important principle of federalism:

> "... Although a court may neither act arbitrarily with respect to those licensed by it nor otherwise violate their constitutional rights, e.g. *Spevack v. Klein*, 385 U.S. 511, 875 Ct. 625, 17 L.Ed. 2d 574 (1967), state courts have traditionally been allowed wide discretion in the establishment and application of standards of professional conduct and moral character to be observed by their court officers." *Erdmann v. Stevens*, 458 F.2d 1205, 1210, (2d Cir. 1972), cert. den. 409 U.S. 889 (1972).

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> "... The courts of the [states] have exclusive jurisdiction over the admission of attorneys, the regulation of the practice of law, and the discipline and disbarment of attorneys, so far as the practice of law in the state courts is concerned." *Ginger v. Circuit Court for the County of Wayne*, 372 F.2d 621, 625 (6th Cir. 1967), cert. den. 387 U.S. 935 (1967).

The substantive issues which the petition necessarily raises are properly within the discretion of the Appellate Division under New York's regulation of its bar, once it is clear that the elements of due process have been afforded petitioner. cf. *In re Ruffalo* 390 U.S. 544, 550 (1968) [disbarment from Court of Appeals for the Sixth Circuit]. Because the substantive standards of professional conduct committed to the discretionary power of the Appellate Division are beyond the jurisdiction of this Court, and because the present record is replete with substantive grounds which would independently justify the action of the Appellate Division, this case is not suitable for this Court's review.

B. ***The due process and equal protection arguments raised here have already been considered elsewhere.***

Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974), considered the same equal protection argument presented here by petitioner and dismissed it as without merit on the basis that New York's procedure bears a rational connection to the vital state interest in maintaining the integrity of the bar. Petitioner presents no compelling reason why further federal review is necessary for this issue.

This Court considered the requirements for due process in attorney disciplinary proceedings in *In re Ruffalo*, 390 U.S. 544 (1968). In that case the Court examined the nature of the proceedings, their constitutional requirements, and laid down general guidelines for the states to follow. Petitioner presents no compelling reason for this Court to reassert those guidelines. His

particular case, at most, represents an application of *Ruffalo's* general guidelines in circumstances unlikely to recur.

C. ***The circumstances of this disciplinary action are unique.***

The circumstances which occurred in this action are unlikely to be repeated and do not represent those of a significant number of persons. In few disciplinary proceedings will an attorney stand convicted of criminal conduct related to activities with his clients. Presumably, in fewer still will an attorney, in mitigation, introduce the subject of a "Stay in Canada," where he used false identification to avoid pending criminal charges. The legal issues and facts confronted here are so unique as to make a ruling of general application improbable. Such a case is undeserving of this Court's attention.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: July 15, 1975

Respectfully submitted,

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APPENDIX

NEW YORK JUDICIARY LAW (McKINNEY 1969)

§ 90. Admission to and removal from practice by appellate division; character committees

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

* * *

3. The suspension or removal of an attorney or counsellor-at-law, by the appellate division of the supreme court, operates as a suspension or removal in every court of the state.

* * *

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or

removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid by the county treasurer of a county within the judicial department, which expenses shall be a charge upon such county.

RULES OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

22 N.Y.C.R.R. §1022.9

(a) Disciplinary proceedings

(1) A verified complaint of professional misconduct against an attorney, stating facts in a form which will fairly permit answer, may be presented to the Appellate Division by a party aggrieved.

(2) Charges of professional misconduct may also be filed by a bar association or its appropriate committee, and may be either verified or accompanied by testimony, affidavits or other supporting proof.

(b) The court shall examine such complaint or charges and rule upon the sufficiency thereof prima facie. If the facts are found insufficient on their face, it shall so advise the complainant. If a complaint appears to warrant further action or inquiry but is not in an-

swerable form, the court shall transmit it to the appropriate bar association to be stated in proper form and/or verified. If the complaint or charges are sufficient prima facie to warrant action, the court may:

(1) direct that a copy be served by a day certain on the respondent with notice of the date fixed by the court prior to which the respondent must answer or make any desired motion addressed to such complaint or charges; or

(2) direct a complaint to be transmitted to a bar association for preliminary investigation and report.

(c) Any factual issue regarding a complaint or charges, raised by answer or otherwise, shall be determined in the first instance by the court or by a justice of the Supreme Court or a referee designated by the court. If no such issue is raised, or after completion of the hearing on such issue, the Appellate Division shall fix a time at which the respondent is to be heard in mitigation or otherwise, unless he waives in writing his privilege so to be heard.

(d) In addition to investigations ordered pursuant to subparagraph (b)(2), a bar association or appropriate committee may move ex parte for an order directing a preliminary investigation of charges of misconduct of an attorney or of unlawful practice of law, brought by or made to one of its officers, committees, counsel or members. In any such investigation testimony under oath may be taken. Membership in the bar association shall not result in disqualification to act therein. Subpoenas shall be issued in the name of the Presiding Justice by the clerk of the Appellate Division, at the request of either the bar association or committee or the respondent, for the attendance of witnesses and production of books and papers.

NEW YORK CIVIL PRACTICE LAW AND RULES, (MC KINNEY 1968)

§5601. Appeals to the court of appeals as of right.

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From an order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that,

upon affirmance, judgment absolute shall be entered against him.

(d) **Based upon non-final determination of appellate division.** An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance or from a final determination of an administrative agency, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

§ 5602. Appeals to the court of appeals by permission.

(a) **Permission of appellate division or court of appeals.** An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers

or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) **Permission of appellate division.** An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

§ 5612. Presumptions as to determinations of questions of fact.

(a) **Appeal from reversal or modification.** On an appeal from an order of the appellate division reversing, modifying or setting aside a determination and rendering a final or interlocutory determination, except when it reinstates a verdict, the court of appeals shall presume that questions of fact as to which no findings are made in the order or opinion of the appellate division were not considered by it, where such findings are required to be made by paragraph two of subdivision (b) of rule 5712.

(b) **Appeal on certified questions of law.** On an appeal on certified questions of law, the court of appeals shall presume that questions of fact as to which no findings are made in the order granting permission to appeal or in the order appealed from or in the opinion of the appellate division were determined in favor of the party who is respondent in the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1592

ARTHUR F. TURCO, JR.,

Petitioner,

v.

MONROE COUNTY BAR ASSOCIATION OF THE STATE OF NEW YORK,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION FOURTH JUDICIAL DEPARTMENT

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Petitioner herewith replies to the brief of respondent in opposition.

I.

RESPONDENT IGNORES THE COURT'S HOLDING IN LINDSEY v. NORMET, 405 U.S. 56 (1972).

We argued in Point I of our petition that the New York procedures denying any

appeal as of right to attorneys--whereas every other litigant was entitled to one such appeal--violated the equal protection clause as explained in Lindsey v. Normet, supra.

The response to this point (pp. 8-10 of respondent's brief) simply pays no attention to the issue; it neither cites, distinguishes, nor so much as refers to Lindsey.

The only concession to the existence of the issue is respondent's statement that "the legislative classification [does not lack] ... appropriate justification." Respondent, however, does not so much as suggest what that justification may be. And indeed there is literally none which can be cited for singling out lawyers as the only class of persons in the State of New York who have no appeal as of right.

In cases after Lindsey, e.g., United States v. Kras, 409 U.S. 434 (1973) and Ortwein v. Schwab, 410 U.S. 656 (1973), this Court emphasized that in litigation involving solely economic rights legislative differentials as to access to courts could be sustained on a standard of "rational classification," whereas where fundamental rights were involved the standard was one of "compelling governmental interest," 409 U.S. at 446; 410 U.S. 660. This Court carefully distinguished a case where a litigant was merely appealing a denial or reduction of welfare payment from one where a litigant's entire life was involved, as where a divorce was at issue, Bodie v. Connecticut, 401 U.S. 371 (1971). See Kras, 409 U.S. at 444 and Ortwein, 410 U.S. at 659. It would seem clear enough

that a lawyer fighting for his right to continue the practice of his profession is fighting for a fundamental right.

But whether the proper standard for the legislative classification in this case is "rational justification" or "compelling governmental interest," the classification cannot be sustained. We note the respondent gives no argument at all to justify the singling out of attorneys.

We previously called the Court's attention to the fact that this precise issue is pending before a three-judge court sitting in the Eastern District of New York and that the case was argued on March 12, 1975. As of the writing of this reply brief, no decision had been rendered.

II.

THE RESPONDENT IGNORES A MAJOR POINT, NAMELY, WHETHER THE RULE OF BAXTRAM V. HEROLD, 383 U.S. 107 (1966), SPECHT V. PATTERSON, 386 U.S. 605 (1967), AND HUMPHREY V. CADY, 405 U.S. 504 (1972), IS APPLICABLE TO LAWYER DISCIPLINARY PROCEEDINGS.

We argued in Point II that a major issue here was the application to lawyer disciplinary proceedings of the due process requirement that before a collateral consequence of a conviction may be imposed, a hearing was required to determine whether that secondary consequence properly flowed from the conviction.

Respondent entirely ignores this point; indeed, no reference is made either to the point or the cases relied on by

petitioner. Respondent deals with the question of the right to relitigate the conviction; but this is a separate point from the right to a hearing to determine whether a designated collateral consequence should flow from a conviction even if not relitigated.

It should be clear that the Appellate Division adjudicated "guilt" of unprofessional conduct solely on the complaint and the answer, where the only conceded fact was that there had been convictions of misdemeanor of a simple assault and weapons possession on pleas without trial. As the legislature did not provide that such convictions (unlike felony convictions) automatically resulted in disbarment, the court was required to exercise judicial judgment on that question. That is the precise point where a due process hearing was required to determine whether the facts and background of the particular misdemeanor convictions merited any bar discipline. No such hearing was had.

Respondent argues that "petitioner had notice and an opportunity to be heard before collateral consequences were attached to his two convictions" because he was afforded a mitigation hearing. (p. 11) But the mitigation hearing occurred after the finding of "guilt" of professional misconduct. One cannot help but recall:

> No, said the Queen, first the sentence and then the evidence.

III.

RESPONDENT MISSTATES THE ALFORD ISSUE.

We argued that the implications of this Court's holding in North Carolina v. Alford was that at least where the issue in litigation was the collateral consequence of a conviction based upon a plea of guilt accompanied by an assertion of innocence, the individual had a right to prove his innocence.

Respondent's only answer is that this question "was not raised in Alford." (p.10). We acknowledge as much but we pointed out that a failure to extend Alford to this point renders an Alford plea meaningless.

Respondent argues that Alford permits New York to attach "evidentiary weight to the conviction" in a case such as this. (p. 10) But that is not the issue. We do not say that the pleas cannot be considered and given weight by the court in the collateral proceeding. What we do say is that they may not be taken as binding, conclusive and dispositive. We submit that the necessary implication of Alford forbids such a holding. Yet that is precisely what the New York Court held.

IV.

RESPONDENT IN EFFECT CONCEDES THE PETITIONER'S ARGUMENT THAT THE PROCEEDINGS BELOW DENIED DUE PROCESS OF LAW.

We pointed out in our petition that the proceedings below lacked the fundamentals of due process because petitioner was disbarred

a) upon charges not included in the disciplinary complaint;

b) upon assertions of a prosecutor unsupported by evidence and on which there

had never been a hearing; and

c) upon the basis of indictments which had been withdrawn.

The response concedes each of the foregoing:

a) At pages 12 to 14 of the response, respondent argues that petitioner was guilty of bail jumping and that the facts respecting that emerged at the mitigation hearing, and thus "it was a proper subject for . . . consideration by the Appellate Division. . ."(p. 14) even though there was no mention of it in the complaint.

But this is precisely Ruffalo. There this Court held that a disbarment could not be predicated upon a charge which first emerged at the hearing and which was not included in the original charges. Yet respondent concedes that was done here and in some unexplained fashion was justified.

b) At page 12 of its response, respondent contends that:

> It thereby becomes necessary for the Appellate Division to consider the totality of the circumstances of those pleas, including the nature of the underlying charges, the factual foundations offered by the prosecutors, and the prosecutor's reasons, stated on the record, for recommending the acceptance of a plea to a reduced charge.

What kind of due process is afforded when a decision on disbarment is based upon "the factual foundations offered by the prosecutor," in another proceeding when such

foundations were in no way supported by a single word of sworn testimony subject to cross-examination!

c) Respondent insists throughout that petitioner could be disbarred because of charges made in indictments which were withdrawn (pp. 12 to 15). Respondent contends this was permissible because "these matters were integrally related to petitioner's assertions in mitigation" (p. 12). But again that is precisely prohibited by Ruffalo, i.e., a charge post hoc based upon testimony which developed at the hearing. The complaint charged professional misconduct based upon indictments as to which there were convictions. It made no charges on the basis of indictments which had been withdrawn.

It is clear that petitioner in this case was not disbarred because of two misdemeanor convictions. He was disbarred because of what the prosecutor in Maryland claimed he could prove at the time the plea was entered and because of the content of indictments which were withdrawn (e.g., bail jumping in New York and conspiracy to murder in Maryland). It is of the essence of due process that petitioner should have been charged with these items and have had a chance to dispute them. He was denied both.

V.

RESPONDENT'S CONTENTION THAT MR. TURCO DID NOT MAKE AN ALFORD PLEA IN MARYLAND IS BASED UPON MISLEADINGLY EXCERPTED PORTIONS OF THE RECORD.

Respondent literally states, referring to the Maryland proceedings, that "The assertion of innocence was stricken from the record" (p.16) and then quotes brief excerpts which it is claimed support that view.

The following is what the record actually shows:

Beginning at page 11 of the Maryland transcript and continuing until page 24, Prosecutor O'Connor stated what her witnesses would testify to if they were called to the stand:

The following colloquy then ensued:

THE COURT: Mr. Buchman or Mr. Kunstler, does the defendant have any evidence to present at this time to controvert the basic contentions of the State, what they propose to prove?

MR. KUNSTLER: Your Honor, in view of the fact that a plea is being accepted , offered and accepted here, I would like to defer comments on my plea prior to sentencing.

THE COURT: I don't think it would be appropriate now. The defendant is offering no evidence.

MR. KUNSTLER: He is offering no evidence at this time.

THE COURT: And nothing to present to the factual question at this time?

MR. KUNSTLER: No, not at this time.

THE COURT: The Court's role, of

course, in accepting a plea of guilty is not only to ascertain the voluntary and intelligent nature of the plea, but also to ascertain that the State's evidence, if established, would provide a factual basis upon which this plea could be founded. Therefore, the Court will accept the plea on the second count of this indictment. Do you wish to present anything by way of mitigation or disposition of the matter? (underscoring supplied)

MR. KUNSTLER: I do, Your Honor . . .
(Tr. p. 24-25)

Mr. Kunstler then proceeded, and after references to Mr. Turco's general character, continued as follows:

> Now, Your Honor, with reference to the particular charges in this situation, Mrs. O'Connor has gone through the State's evidence, and we offered no evidence when Your Honor asked the question, in refutation of those charges in view of the fact we had negotiated a plea for Mr. Turco, but I think in the imposition of sentence, it is only fair to indicate to Your Honor what the defendant would have presented in refuting these charges had he decided not to accept the plea which was negotiated.
> (Tr. p. 28-29)

He continued then for nine pages outlining the various witnesses who would support the defense of alibi. He concluded as follows:

Mr. Turco would have taken the stand. That was our plan, and he would testify to everything he had done that would correspond to what the witnesses said about him.

That is sort of a brief resume of what we would have presented had we gone ahead with the defense in this matter. I might indicate to Your Honor, without, of course, changing Mr. Turco's plea because he has pled guilty to common assault, that his position was throughout this case he was totally innocent of all the charges. He pled not guilty to the indictment. We were tried on the first indictment and there was a hung jury, and his position is essentially the same today. However, it was for that, just as the State does, and now Mrs. O'Connor indicated, there are hazards in trial, particularly when a life is at stake, because of that understanding he has taken the plea which has been offered and accepted by Your Honor.

(Tr. p. 38-39

There then ensued the following colloquy:

MRS. O'CONNOR: Objection. At this point I would like to approach the bench.

(The following took place at the bench).

MRS. O'CONNOR: There was an expressed agreement in chambers, and that's the reason the agreement was made in chambers, which I think

he probably has violated in his dissertation and now is completely violating by stating the reasons for the plea. It is my understanding the defendant would stand mute and he is trying to get in the back door . . .

MR. KUNSTLER: He has certainly stood mute but I think in going into an appropriate sentence, I am entitled to say his position, he is innocent of all the charges. I said that that is his position from the beginning. That has been the extent of it. I think the defendant has not said a word. We have nothing further to say about it anyway.

THE COURT: It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the plea and that it was being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina v. Alford. It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant.

MR. KUNSTLER: I don't think we have really said there is a conflict with that aspect.

THE COURT: I think you said Mr. Turco would testify he is completely innocent of any wrongdoing.

MR. KUNSTLER: His position is he is innocent. He would testify what he did and where he was. I gave the evidence his witnesses would have given. I said his position is he is innocent but accepting the plea to avoid further litigation.

MRS. O'CONNOR: That's the exact issue we went over this morning.

MR. KUNSTLER: I understood he would take no position on the stand.

THE COURT: As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts. Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was a factual basis. But if Mr. Turco's position is he does not feel in any way that he has ever done anything wrong, and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis.

(Tr. 39-42)

MRS. O'CONNOR: Correct. We would ask the entire portion starting "if Mr. Turco were called to the stand . . ." be deleted at this point and the plea continue with the completion of the last witness, Mr. Clark.

MR. KUNSTLER: I would agree to that.

(Proceedings at the bench were terminated.)

THE COURT: Would the State please repeat its position made at the bench.

MRS. O'CONNOR: The State would request that the portion of the transcript be deleted from the last witness stated by Mr. Kunstler, whom I believe was Mr. Clark's testimony as Mr. Clark would give it, from there on out the State would request any testimony given by Mr. Turco, any reason asserted by Mr. Kunstler on behalf of Mr. Turco be deleted from the record.

MR. KUNSTLER: I have no objection.

THE COURT: The record will disclose Mr. Turco individually is making no assertion concerning his own participation in the case. Is that correct?

(Tr. 41-42)

It is evident from the foregoing that the issue debated before the court was

whether Mr. Kunstler would be permitted to include in his recitation a statement of what Mr. Turco would personally testify to if he took the stand. Mrs. O'Connor objected to that and, on being pressed, Mr. Kunstler withdrew that particular portion of his statement. This is unmistakeable as it appears from the colloquy quoted supra.

Thus, everybody in the courtroom in Maryland understood that the issue was about whether there would be a statement of what Mr. Turco personally would say if he took the stand. There was no objection at all to Mr. Kunstler's recounting of the defense of alibi as it would emanate from other witnesses.

It is completely clear that in Maryland the petitioner, through his counsel, persisted in his assertion of innocence.

VI.

RESPONDENT'S BRIEF COMPOUNDS THE BASIC UNFAIRNESS OF THE PROCEEDINGS BELOW.

At several points in respondent's brief statements are made which would not have been made had the elements of fundamental fairness been respected

a) we note the following statement in the last paragraph of page 11 of respondent's brief:

> His pleas were supported by strong evidence of actual guilt.

There was not a single iota of evidence let alone strong evidence. There was an unsupported prosecutor's statement which was disputed. If there was evidence, it was that which was produced at the first trial where the main witness' testimony was stricken by the judge as being incredible! (See note 3, p. 11 of Petition for Certiorari).

b) we note that in the second paragraph of page 7 of its brief respondent contends that at the hearing before Judge Smith "Mr. Turco presented...testimony as to his asserted innocence of the charges which were the basis for his convictions in Maryland and New York City."

Respondent knows that precisely because the Appellate Division had held before the hearing that petitioner had no right to prove his innocence, he did not offer proof of innocence before Judge Smith other than his personal denials. How could he offer the testimony of the

numerous witnesses supporting him after the Appellate Division had in advance ruled out their testimony.

These types of misstatements as well as the suggestion that there was not in Maryland a contention of innocence which remained on the record (Point V, supra) reflect the fundamental deficiences of the entire proceeding. Throughout, petitioner has been dealt with as if the record were something different from what it is - as if he had actually committed a murder in Maryland. This appears not only in respondent's brief but in the opinion of the Appellate Division.

We do not believe such misstatements of the record would have been made had there been a decent regard for procedural fairness.

VII.

THE QUESTIONS PRESENTED MERIT THE ATTENTION OF THIS COURT.

A. Respondent argues that "substantive issues" involved in disciplinary New York attorney proceedings are outside the scope of this Court, "once it is clear that the elements of due process have been afforded petitioner" (P. 18). But that of course begs the question; the case before this Court involves precisely questions as to a denial of procedural due process.

B. Respondent contends that questions of due process in attorney disciplinary proceedings have been adequately addressed in In re Ruffalo and that there are no compelling reasons to reassert those

guidelines. This case is the best proof of the need to demonstrate the reach of the principles of Ruffalo.

C. Lastly, the respondent contends that the circumstances of this case are unique and therefore do not require the attention of the Court. Whether or not this or any other case is unique is not the point: The procedural issues involved in this case are far from sui generis; they pervade the entire field of lawyer disciplinary proceedings and, as demonstrated by our extensive citations to other state statutes (pp. 18-19 of the petition) are of most general application.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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